Supreme Court, U.S.
FILED

No. 07-1575 APR 14 2008

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In The

Supreme Court of the United States

PHILLIP R. NEELY,

Petitioner,

v.

CITY OF RIVERDALE, IRIS JESSIE THETUS A. KNOX, T. MICHAEL MARTIN and WANDA WALLACE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI (Amended)

Michael B. King
Council of Record
For the Petitioner
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QUESTIONS PRESENTED

1. Whether a plaintiff's prima facie case of retaliation (using the model in *McDonnell Douglas Corp. V. Green,* 411 US 796, 802 (1973), combined with sufficient evidence for a reasonable fact-finder to reject the employer's reason for its decision, is adequate to sustain a finding of *employment retaliation* under Title VII.

2. Whether, in a suit against an employer alleging employment retaliation and discrimination under Title VII, the plaintiff must prove pretext by evidence showing the employer *believed its proffered reasons for the adverse action was false.*

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OPINION BELOW

The Eleventh Circuit Court of Appeals affirmed the opinion of the district court without publishing a separate opinion.

JURISDICTION

The Eleventh Circuit filed its decision on October 17, 2007, and entered an order denying petitioner's motion for rehearing on January 14, 2008. This Court has jurisdiction under 28 U.S.C. Section 1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 2000e-2(a)

It shall be an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, term, terms, conditions or privilege of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. Section 2000e-3(a)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment..... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF CASE

Phillip R. Neely, an African-American male, was employed with the City of Riverdale as a police officer from January 14, 1998 through September 2007. On August 5, 2002, he was promoted to patrol captain. Petitioner received above average ratings on his annual performance evaluations.

On or about December 23, 2003, the United States Department of Justice completed a report concerning racial tension in Riverdale's police department. Petitioner was invited to appear on a local radio talk show and discuss the DOJ report. Petitioner stated the DOJ report confirmed that racial discrimination existed in the police department. After petitioner made the discrimination comments,

Riverdale's white police chief (1) suspended him for one day and demoted him to sergeant; and (2) promoted him back to captain and placed him on administrative leave pending an internal affairs investigation concerning the public comments. Riverdale's black interim manager terminated his employment as police captain. Following an administrative appeal hearing, Riverdale allowed petitioner to return to his employment as a patrol captain.

On or about November 10, 2004, petitioner submitted his letter of interest for the vacant assistant police chief position to Riverdale's Human Resources Director. Riverdale's personnel policies provided that hiring preference should be given to current employees before seeking outside applicants. In a letter to petitioner, dated November 30, 2004, police chief, Thetus Knox wrote: **Personnel records indicated that you received a three (3) day suspension in July of this year. If you were selected as a result of the process you could not be promoted.**

Chief Knox testified in her deposition that Major Spivey informed her that petitioner had been suspended. ***(False)*** Major Spivey testified in his deposition that he did not tell Chief Knox that petitioner had been suspended in July 2004. Chief Knox did not testify that she learned of the purported suspension from personnel records. Chief Knox further testified Riverdale did not have a data base on disciplinary action. ***(False)***

Major Barney (interim police chief in July 2004) testified that if petitioner had been suspended in July 2004, a Notice of Suspension would have been placed in his personnel file. Petitioner testified in his deposition that he was not suspended from his employment in July 2004. The district court did not find any evidence in the record that petitioner had been suspended from his employment.

Riverdale's personnel policies required the police chief to consult with the city manager before making hiring and promotion decision. Chief Knox testified that she consulted with Riverdale's city manager concerning her hiring and promotion decisions. ***(False)*** City manager, Iris Jessie, testified in her deposition that she did not participate in any of Chief Knox's hiring and promotion decisions. In January 2005, Chief Knox hired an outside applicant, Samuel Patterson, as Riverdale's assistant police chief.

On or about March 2, 2005, Assistant Chief Patterson informed petitioner that Chief Knox had demoted him to sergeant because he did not fit the chief's management plan. On the personnel form, Chief Knox indicated the demotion was a "no-fault" reclassification. Chief Knox promoted a white female to replace petitioner. Petitioner testified that the female was not qualified for the captain position because she did not have the required college degree. Chief Knox admitted in her deposition that the white female did not meet all Riverdale's written requirements for the captain position.

On December 9, 2005, Chief Knox promoted white officer, Ed Mashburn, to captain over petitioner. On December 16, 2005, Chief Knox promoted white officer, Terry Harget, to captain over petitioner. Petitioner testified in his deposition that the white officers were not qualified for the captain position because they did not have the required college degrees and management/supervision certifications. Chief Knox testified in her deposition that the white officers did not meet all Riverdale's written requirements for the captain position. Knox further testified that petitioner was denied the promotions because he was not a "team player". Knox did not indicate on petitioner's 2004, 2005 and 2006 performance evaluations that he was not a "team player". This assertion was a pretext for employment retaliation and discrimination.

Riverdale's minimum qualifications for patrol captain included (1) an associate degree from an accredited college or university; (2) minimum of two years in grade as a police lieutenant; and (3) a Georgia Peace Officer Standards and Training Council Supervision. The three white officers promoted by Chief Knox lacked these minimum qualifications. Knox did not have authority to change the qualifications without the approval of the city manager. The manager did not consult with Knox concerning the promotions and she did not approve any changes to Riverdale's written qualifications for patrol captain.

Petitioner filed his civil action alleging the respondents violated his Title VII and constitutional rights by (1) denying him the promotion to assistant police chief; (2) demoting him to sergeant; (3) denying him promotions to captain; and (4) promoting three **non-qualified white officers to captain over him.** The district court adopted the recommendations of the magistrate judge and granted the respondents summary judgment on petitioner's claims. The district court also granted the respondents' request for a sanctions against petitioner and his counsel because counsel mentioned in the response brief adverse employment action against petitioner which occurred prior to November 2004. **The sanctions decision is pending in the district court.**

The district court erroneously held: "**The pretext analysis focuses on the employer's beliefs and perceptions of the employee's performance.** See ***Cofield v. Goldkist, Inc. 267 F.3d 1264, 1268 (11th Cir. 2001)***". "**The evidence does not create a question of fact as to whether Chief Knox actually believed that plaintiff was ineligible for promotion because of a suspension.**"

The district court found that Chief Knox believed petitioner did not have the "**willingness to work with her**". Knox believed Mashburn and Harget possessed the willingness. The district court held that "**[n]one of the evidence cited by plaintiff rebuts**" Chief Knox's beliefs "**head-on**". The district court further held that the "**evidence cited**

by plaintiff, however, does not create an issue of fact with regard to pretext, it merely questions the wisdom of the decision-maker but does not support a finding that the decision was based on discrimination or retaliation."

Petitioner appealed the summary judgment decision to the Eleventh Circuit Court of Appeals. The parties filed written briefs. The Court set the appeal for oral arguments. On October 17, 2007, the Court entered a *per curiam* decision affirming the district court's opinion. Petitioner's Motion for Rehearing was denied on January 14, 2008. The Eleventh Circuit denied petitioner's motion to stay the mandate.

Petitioner now files this his Petition for Writ of Certiorari in the United States Supreme Court because the lower courts' decisions conflict with this Court's decisions in ***St. Mary's Honor Center v. Hicks,*** 509 U.S. 502 (1993) and ***Reeves v. Sanderson Plumbing Prod.,*** 530 U.S. 133 (2000). The decision also conflicts with other circuit courts considering the Title VII pretext standard..

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted To Determine Whether A Plaintiff's *Prima Facie* Case Of Retaliation, Combined With Sufficient Evidence For A Fact-finder To Reject The Employer's Reason For The Adverse Action, Is Adequate To Sustain A Finding Of Retaliation Under Title VII.

In *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133 (2000), this Court granted certiorari to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of **discrimination,** combined with sufficient evidence for a reasonable fact-finder to reject the employer's nondiscriminatory explanation for its decision, was adequate to sustain a finding of liability for **intentional discrimination.** Id. This Court held that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification was *false,* may permit the trier of fact to conclude that the employer unlawfully **discriminated.** Id. At 148. The plaintiff is not required to produce "**additional, independent evidence of discrimination**". Id. at. 149. The falsity of the employer's explanation is alone enough to compel judgement for plaintiff. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 518 (1993).

This Court has not had the opportunity to decide

whether a Title VII plaintiff's prima facie case of **retaliation,** combined with sufficient evidence to find the employer's proffered reason for the adverse employment action was false, may permit the trier of fact to conclude that the employer retaliated against the plaintiff because he engaged in activity protected under Title VII. **Reeves and Hicks** were employment discrimination cases.

In ***Swierkiewicz v. Sorema N.A.,*** 534 U.S. 506 (2002) this Court reaffirmed that the "the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" Id. Under the ***McDonnell Douglas*** framework, once an employer has met its burden of producing a legitimate nondiscriminatory reason for the decision, the plaintiff is afforded the "opportunity" to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not the true reasons, but were pretext for discrimination. ***Texas Dept. Of Community Affairs v. Burdine,*** 450 U.S. 248, 253 (1981). The plaintiff may "`establish that he was the victim of intentional discrimination by showing that the employer's proffered explanation is unworthy of credence.'" ***Reeves,*** at 143, "Unworthy of credence bear no other meaning but that the falsity of the employer's explanation is alone enough to compel judgment for the plaintiff". ***Hicks,*** at 518.

In the absence of direct evidence, retaliation claims are governed by the ***McDonnell Douglas***

burden shifting framework. ***Christopher v. Stouder Mem'l Hosp.*** 939 F.2d 870, 877 (6th Cir. 1991). There is conflict between the Eleventh Circuit and the Eighth Circuit concerning the evidence a plaintiff alleging employment retaliation, must produce to show pretext. In the Eight Circuit, the plaintiff must both disprove the employer's stated reason, and, independently, present evidence that permits the inference that retaliation was the real reason. ***McCullough v. Real Foods, Inc.,*** 140 F.3d 1123, 1127 (8th Cir. 1998) (a pre-**Reeves** retaliation case).

The Eleventh Circuit considered a similar issue in ***Hairston v. Gainesville Sun Pub. Co.*** I F.3d 913 (11th Cir. 1993). In ***Hairston,*** the ADEA plaintiff alleged his employer retaliated against him in violation of 28 U.S.C. Section 621 et seq. The Eleventh Circuit adapted to issues of age discrimination the principles of law applicable to cases arising under the similar provisions of Title VII. ***Hairston,*** at 919. The Circuit held that the plaintiff was not required to introduce evidence beyond that already offered to establish the prima facie case to show pretext. Id. At 921. The ***Hairston*** decision preceded ***Reeves.***

The pretext standards established in ***McCullough*** and ***Hairston*** were not consistent with the pretext standard in ***Reeves.*** In ***Reeves***, this Court held that a discrimination plaintiff may survive judgment as a matter of law by establishing a "prima facie case" and producing evidence from

which the fact-finder could conclude that the employer's proffered reason for the adverse employment action was ***false.*** ***Reeves,*** at 148.

In the present case, counsel for petitioner argued on appeal that the district court should have applied the standard in ***Reeves*** to his retaliation claim. The Eleventh Circuit rejected this argument and affirmed the district court's decision to not apply the standard in ***Reeves*** to petitioner's retaliation claims. The lower courts may have been reluctant to extend the holding in ***Reeves*** beyond a Title VII discrimination claim.

The petition for writ of certiorari should be granted so this Court can resolve a conflict among the Courts of Appeals as to whether a Title VII plaintiff's prima facie case of ***retaliation,*** combined with sufficient evidence for a reasonable fact-finder to reject the employer's explanation for its decision, is adequate to sustain a finding of retaliation. Without proper guidance from this Court, circuit courts will not have a clear uniform pretext standard to apply to Title VII retaliation cases.

II. Certiorari Should Be Granted To Determine Whether, In A Suit Alleging Employment Retaliation And Discrimination Under Title VII, The Plaintiff Must Prove Pretext By Evidence Showing The Employer *Believed Its Proffered Reason For The Adverse Action Was False.*

McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973) and subsequent cases "established an allocation of the burden and an order for presentation of proof in Title VII discrimination treatment cases" *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 (1993). "First, the plaintiff must establish a prima facie case." *Texas Dept. Of Community Affairs v. Burdine,* 450 U.S. 248, 252 (1981) Next, the employer has the burden of producing an explanation to rebut the prima facie case. Id. If the employer satisfies its "`burden of production, the presumption raised by the prima facie case is rebutted.'" Id. The plaintiff now has the "`burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination [and/or retaliation] Id.

The plaintiff may "`establish that he was the victim of intentional discrimination [and retaliation] by showing that the employer's proffered explanation is unworthy of credence.'" *Reeves* at 143 "Unworthy of credence" means that the "falsity of the employer's explanation is alone enough to compel judgment for the plaintiff. *Hicks,* at 518.

Although "the presumption of discrimination [and retaliation] 'drop out of the picture' once the [employer] meets its burden of production . . . the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom . . . on the issue of whether the [employer's] explanation is

pretextual.'" *Reeves*, at 147. In *Reeves*, this Court held that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted explanation is false, may permit the trier of fact to conclude that the employer unlawfully discriminated [or retaliated] against the plaintiff. Id at 148. Under this Court's new pretext standard, the plaintiff "***is not required to produce additional, independent evidence of discrimination.***" Id. at. 149.

In the present case, the district court applied a pretext standard that was contrary to the standard established by this Court in ***Reeves*** and followed by the Eighth Circuit Court. The Eleventh Circuit affirmed the erroneous standard. The district court held: "**The pretext analysis focuses on the employer's beliefs and perceptions of the employee's performance.**" The court cited *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 as support for the pretext standard. The court concluded: "**The evidence does not create a question of fact as to whether Chief Knox actually believed that plaintiff was ineligible for promotion because of a suspension.**"

In *Kim v. Nash Finch Co.* 123 F.3d 1046 (8th Cir. 1997), the Eighth Circuit applied a pretext standard similar to this Court's standard in *Reeves*. Id. The court held evidence showing that the employer's proffered reason was false, plus the evidence establishing the elements of the prima facie case were sufficient to permit the jury to find that

the employer intentionally discriminated against the plaintiff. Id. In ***Reeves and Kim,*** the pretext analysis did not focus on the employer's belief and perceptions of the employee's performance. Id. The focus was on evidence of false explanation for the adverse employment action and prima facie case.

The Eleventh Circuit placed a higher burden of proof on plaintiff than required by this Court and the Eighth Circuit. The respondents did not challenge petitioner's prima facie case of retaliation and discrimination concerning promotion to captain and demotion to sergeant. Petitioner produced evidence showing that Chief Knox's reasons for denying him the promotion to assistant chief was false. Knox testified that petitioner could not be promoted to assistant chief because he had been suspended in July 2004. She stated Major Spivey had informed her of the suspension. Major Spivey testified that he did not tell Knox that the petitioner had been suspended. Petitioner testified that he had not been suspended. Petitioner's personnel file did not include a suspension notice.

Knox also falsely stated that she consulted with the city manager concerning the promotions and hiring. The manager testified that she did not discuss the promotions and hiring with Knox. Petitioner also produced his above-average performance evaluations to show that he was a team player, and Riverdale's written qualifications for the patrol captain to show the white officers promoted to

captain over him did not meet the minimum qualifications for the vacant captain positions.

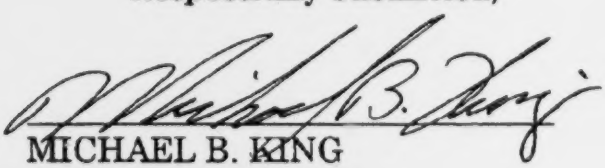
The lower courts overlooked petitioner's evidence supporting his prima facie case and contention that Chief Knox was not worthy of belief.

Certiorari should be granted to resolve the conflict between the pretext standard established by this Court and followed by the Eight Circuit and the standard, focusing on the belief of the employer, that was affirmed by the Eleventh Circuit. Such action will allow this Court to maintain a uniform pretext standard in all the circuits.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decisions of the Eleventh Circuit Court of Appeals and district court.

Respectfully submitted,



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Appendix A

ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11847

PHILLIP R. NEELY

Plaintiff-Appellant,

versus

CITY OF RIVERDALE,
IRIS JESSIE, individually and in her official capacity as city manager,
THETUS A. KNOX, individually and in her official capacity as city police chief
T. MICHAEL MARTIN, individually and in his official capacity as city hearing officer,
WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendants-Appellees.

On Appeal from the United States District Court of the

Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: CARNES and BARKETT,
Circuit Judges, and Cohn, *District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no judge in regular active Service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE
COURT:

_____
STATES CIRCUIT JUDGE

*Honorable James I. Cohn, United States District Judge for the Southern District of Florida, sitting by designation

Ord-42
(2/05)

Appendix B

ELEVENTH CIRCUIT DECISION

[Do Not Publish]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-11847

D.C DOCKET No. 05-01930-CV-GET-1
PHILLIP R. NEELY,

Plaintiff-Appellant,

Versus

CITY OF RIVERDALE,
IRIS JESSIE, individually and in her official capacity as city manager,
THETUS A. KNOX, individually and in her official capacity as city police chief
T. MICHAEL MARTIN, individually and in his official as city hearing officer,
WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendants-Appellees.

On Appeal from the United States District Court for

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the Northern District of Georgia

(October 17, 2007)

Before CARNES and BARKETT, Circuit Judges, and COHN, *District Judge.

PER CURIAM:

We find that the district court correctly granted summary judgment in favor of the Defendant-Appellees, the City of Riverdale; Iris Jessie, the City Manager; Thetus A. Knox, the Chief of Police; T. Michael Martin, City Hearing Officer; and Wanda Wallace, City Councilwoman. (Footnote 1)

AFFIRMED

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*Honorable James I. Cohn, United States District Judge for the Southern District of Florida, sitting by designation.

[1]We express no view on any sanctions issue. Although the briefs discuss issues relating to the district court's decision to sanction Neely and his counsel, because, because no final order has been entered on sanctions, at this time we lack jurisdiction to review any issue relating to sanctions.

Appendix C

DISTRICT COURT'S JUDGMENT

C1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELEY

Plaintiff,
vs.

CIVIL ACTION FILE
No. 1:05-cv-1930-GET

CITY OF RIVERDALE,
IRIS JESSIE, individually and in her official capacity;
THETUS A KNOX, individually and in her official capacity as city police chief;
T. MICHAEL MARTIN, individually and in his official capacity as hearing officer;
WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendants.

JUDGMENT

This action having come before the court, Honorable G. Earnest Tidwell, United States District Judge, for consideration of Magistrate Judge's Report and Recommendation as to defendants' motions for summary judgment, and the court having **ADOPTED** said recommendation and **GRANTED** said motions, it is **Ordered and Adjudged** that the plaintiff take nothing; that the defendants recover their costs of this action, and the action be, and the same hereby, is **DISMISSED.**

Dated at Atlanta, Georgia this 30th day of March 2007

JAMES N. HATTEN
CLERK OF COURT

By: *s/ Sheila Gonzalez*
Deputy Clerk

Prepared, Filed and Entered
in the Clerk's Office
March 30, 2007
James N. Hatten
Clerk of Court

By: s/Sheila Gonzalez
Deputy Clerk

Appendix D

DISTRICT COURT'S DECISION

D1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELEY

Plaintiff,
vs.

CIVIL ACTION FILE
No. 1:05-cv-1930-GET

CITY OF RIVERDALE,
IRIS JESSIE, individually and in her official capacity;
THETUS A KNOX, individually and in her official capacity as city police chief;
T. MICHAEL MARTIN, individually and in his official capacity as hearing officer;
WANDA WALLACE, individually and in her official capacity as city councilwoman,

Defendants.

Filed in Clerk's Office
U.S.D.C. Atlanta
March 29, 2007

JAMES N. HATTEN, Clerk
By: _____ Deputy Clerk

ORDER

The above-styled matter is presently before the court on: (1) Magistrate Judge's Report and Recommendation: [docket no. 104] and defendants Jessie, Martin, and Wallace's motion for Rule 11

sanction [docket no. 65];

(2) plaintiff objections to the R&R [docket no. 105].

On July 25, 2005, plaintiff filed this action against defendants alleging discrimination based on race and gender and retaliation for his complaint to the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U.S.C. § 1983, 42, U.S.C. § 1988, 42 U.S.C. § 1991, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., and the first and Fourteenth Amendments to the United States Constitution. On August 30, 2005, defendant filed a motion to dismiss. On October 18, 2005, the Magistrate Judge issued a Non-Final Report and Recommendation ("R & R"). Specifically, the Magistrate Judge recommended that defendant's motion to dismiss "for improper service, for failure to receive and attach on EEOC Right-to-Sue Letter for the claims arising out of Plaintiff's fifth EEOC charge, no. 110-2005-01786, and as against the individually-named Defendants as improper parties" be denied without prejudice. The Magistrate Judge also recommended granting defendant's motion to dismiss as to "Plaintiff's first through his fourth EEOC Charges for failure to receive an EEOC Right-to-Sue Letter." Plaintiff filed an objection as to the dismissal of his third and fourth EEOC charges only.

On November 14, 2006, the court issued an order granting defendants' motion to dismiss as to plaintiff's claims arising out of plaintiff's first and

second EEOC charges and denied defendant's motion to dismiss without prejudice as to plaintiff's claims arising out of plaintiff's third, fourth and fifth EEOC charges. On April 10, 2006, defendants Iris Jessie, Thetus A. Knox, T. Michael Martin, and Wanda Wallace filed a motion for summary judgment. Defendant City of Riverdale filed a separate motion for summary judgment that same day. On June 1, 2006, defendants Jessie, Martin and Wallace filed a motion for sanctions pursuant to Fed. R. Civ. P. 11.

On February 13, 2007, the Magistrate Judge issued a Report and Recommendation ("R &R") granting defendants' motions for summary judgment. The Magistrate Judge also recommends granting defendants' motion for Rule 11 sanctions.

Standard

Pursuant to 28 U.S.C. § 636 (b) (1), each party may file written objections, if any, to the R & R within ten (10) days of the receipt of an order. If any party serves and files written objections, the district courts is required to conduct a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. 28 U.S.C. § 636 (b) (1) ©). If no objections are filed, the District Court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. Denied, 464 U.S. 1050, 104 S. Ct. 729 (1984).

Discussion

Plaintiff asserts several objections to the Magistrate Judge's R & R. The court will address each objection in turn.

Objection No. 1

The Magistrate Judge erroneously concluded that retaliation and discrimination claims, which were purportedly released by plaintiff on November 2, 2004 and occurred before the release date, were barred.

It is undisputed that, on November 2, 2004, plaintiff executed a General Release and Indemnity Agreement ("Release") in exchange for $95,000.00 in settlement of his claims against the City, its officials and employees. The Release states that plaintiff acknowledges releasing "all legal and equitable claims of every kind and nature... which [plaintiff] may now have or which may hereafter accrue on account of or resulting from his claims included or that could have been included" in his then-pending EEOC charges.

The Magistrate Judge's R & R noted that the court already has dismissed plaintiff's claims arising out of EEOC charges 2014 and 3114. The Magistrate Judge further found that plaintiff's claims resting on adverse actions predating the Release are subject to summary judgement, as follows:

(1) Demoting plaintiff to sergeant for one day on March 12, 2004;

(2) Suspending plaintiff for one day on March 12, 2004;

(3) Placing plaintiff on paid administrative leave on February 2004 to May 2004;

(4) Terminating plaintiff on May 12, 2004;

(5) Suspending plaintiff for three days on July, 2, 2004, by order of Defendant Martin;

(6) Failing to promote plaintiff to police chief on September 27, 2004; and

(7) Being told "I will get you" by defendant Jessie.

Plaintiff now argues that the Release was null and void under Georgia law because it did not contain certain statutory language. Therefore, according to plaintiff, the Magistrate Judge should not have found that he was barred from bringing those claims. Plaintiff also states that this court's November 14, 2005 order "erroneously concluded" that plaintiff's retaliation and its crimination claims predating the Release were barred.

The court finds that plaintiff fails to point the court to evidence sufficient to create a question of fact as to whether the Release was subject to the statutory language cited by plaintiff and, therefore, null and void. This is especially true in light of plaintiff's admission that he executed the Release settling his claims and the absence of any evidence that plaintiff returned the $95,000.00 settlement proceeds. Furthermore, to the extent plaintiff is objecting to the Magistrate Judge's October 18, 2005

Non-Final R & R and this court's November 14, 2005 order dismissing plaintiff's claims, the objection is untimely.

Therefore, the Magistrate Judge correctly found that plaintiff's claims arising out of EEOC charges 2014 and 3114 and resting on adverse actions which predate the Release are not actionable. Accordingly, plaintiff's objection No. 1 is OVERRULED.

Objection No. 2

The Magistrate Judge erroneously concluded that plaintiff did not produce sufficient evidence to create a genuine issue of material fact concerning his failure to promote to assistant police chief retaliation claim.

The Magistrate Judge found that defendant articulated a legitimate non-discriminatory reason for denying plaintiff the promotion to assistant police chief. Specifically, defendant points to Chief Knox's letter to plaintiff informing him that because he had been suspended within the last twelve months, he was not eligible for promotion. The Magistrate Judge further found that plaintiff could not show that defendant's legitimate nondiscriminatory reason for not promoting plaintiff to assistant police chief was mere pretext.

Plaintiff, in support of objection No. 2, cites seventeen items which he contends show that the reason given for denying the promotion to plaintiff

was pretext "because (1) the reason was false; (2) Knox knew that plaintiff had not been suspended from his employment within twelve months of November 20, 2004 because there was (sic) notice of suspension in plaintiff's personnel file for Knox to review; (3) Knox and Jessie did not comply with the personnel policy for posting the assistant police chief vacancy and (4) Knox used her false representation of plaintiff's prior suspension status to deny him the promotion to assistant chief because of his EEOC complaints and his appearance on the "Coz" radio show and the local television news." Plaintiff's record citations, however, do not support a finding of pretext because, although the record supports a finding that plaintiff was not suspended, the evidence does not create a question of fact as to whether Chief Knox actually believed that plaintiff was ineligible for promotion because of a suspension.

The pretext analysis focuses on the employer's beliefs and perceptions of the employee's performance. See Cofield v. Goldkist, Inc., 267 F.3d 1264, 1268 (11th Cir. 2001). Chief Knox testified that she was informed by Major Raymond Spivey that plaintiff had been suspended for three days during the preceding twelve month and that she did not independently verify this information. Knox further testified that if she had reviewed plaintiff's file and had not found a document indicating the suspension, the absence of the document would not have had any meaning to her because the City did not "have a data base on disciplinary actions." Furthermore, there is no evidence that plaintiff attempted to correct Chief

Knox's misconception about his suspension after receiving her letter. Rather, plaintiff did not complete the application process for promotion.

Therefore, in light of the foregoing, the court finds that the Magistrate Judge correctly concluded that plaintiff failed to present sufficient evidence of pretext as to plaintiff's failure to promote to assistant chief of police. Accordingly, plaintiff's objection No. 2 is OVERRULED.

Objection No. 3

The Magistrate Judge erroneously concluded that plaintiff did not produce sufficient evidence to create a genuine issue of material fact concerning his failure to promote to captain retaliation and discrimination claims.

Defendant City moved for summary judgement on plaintiff's claim that he was discrimination against on the basis of this race and sex and retaliated against when he was denied promotions to captain and Mashburn (white male) an Harget (white male) were promoted to captain instead. Defendant argued that plaintiff never filed or supplemented an EEOC charge on this issue and also that plaintiff can not show that defendant's legitimate nondiscriminatory reason for promoting Capts. Mashburn and Harget are pretextual.

The Magistrate Judge found that plaintiff had not responded to defendant's argument that he had

failed to exhaust his administrative remedies. The Magistrate Judge further found that none of plaintiff's EEOC charges included plaintiff's failure to promote claim nor could this claim be reasonably expected to grow out of any of his other claims. The Magistrate Judge also found that even if plaintiff had administratively exhausted this claim, plaintiff fails to show pretext.

Plaintiff objects to the findings of the Magistrate Judge arguing that (1) he was not required to exhaust his administrative remedies and (2) no reasonable person would have promoted "nonqualified Mashburn and Harget to patrol captain over highly qualified plaintiff." Plaintiff cites evidence of his expensive education and positive performance evaluation in support of his contention that he was more qualified than Mashburn and Harget. Plaintiff also cites evidence that defendant did not post the vacant captain positions in the manner required by the personnel rules.

Having considered plaintiff's objection and the relevant portion of the record, the court finds that plaintiff fails to present sufficient evidence of pretext to avoid summary judgment on his failure to promote to captain claim. Chief Knox identified certain attributes she sought in her managerial team, such as a willingness to work with her, which she believes plaintiff did not have and Mashburn and Harget possessed. None of the evidence cited by plaintiff rebuts this evidence head-on. See id. (The disparity in qualifications must be "so apparent as virtually to

jump off the page and slap you in the fact"); see also e.g. Tarrance v. Montgomery County Dd. Of Educ., 157 F. Supp. 2d 1261, 1263-1265 (M. D. Ala 2001) (employers have the freedom to make unwise, unsound, or even irrational decisions). Therefore, plaintiff's Objection No. 3 is OVERRULED.

Objection No. 4

The Magistrate Judge erroneously concluded that plaintiff did not produce sufficient information to create a genuine issue of material fact concerning his Title VII demotion to sergeant retaliation and discrimination claims.

Defendant moved for summary judgment on plaintiff's claims related to his demotion to sergeant arguing that plaintiff could not show that defendant's legitimate nondiscriminatory reasons for the demotion were pretextual. Defendant contends that plaintiff was demoted as part of Chief Knox's reorganization of the police department shortly after she took office. Chief Knox wanted to appoint a supervisory team of officers who were hardworking, progressive, motivated and supportive of her leadership but found that he undermined her authority and challenged her decisions.

The Magistrate judge found that plaintiff failed to show pretext. Specifically, the Magistrate Judge noted that although plaintiff asserts he was an excellent patrol captain with good performance, plaintiff failed to present evidence which addresses

Chief Knox's believe that plaintiff was not supportive of her leadership and challenged her decisions. The Magistrate Judge also found that plaintiff failed to show that nay disparity in qualifications between plaintiff and the two officers promoted to captain, (Ms. Pressley and Mr. Watson) or the one officer whose rank of captain was maintained was so great that no reasonable person could have taken these actions. Finally, the Magistrate Judge found that plaintiff did not provide sufficient foundation for his assertion that Ms. Pressley did not meet the minimum qualifications for a captain's position.

Plaintiff objects to these findings of the Magistrate Judge, arguing that "[n]o reasonable person would have promoted a non-qualified sergeant to replace plaintiff as patrol captain. No reasonable person would believe Knox's reasons for demoting plaintiff after reviewing his 2005 performance evaluation." The evidence cited by plaintiff, however, does not create an issue of fact with regard to pretext because it merely questions the wisdom of the decision but does not support a finding that the decision was based on discrimination or retaliation. See ed. Therefore, plaintiff's Objections No. 4 is OVERRULED.

Objection No. 5

The Magistrate Judge erroneously concluded that plaintiff did not produce any evidence which showed that the adverse employment action was motivated by his protected speech.

Plaintiff alleges that he was subjected to adverse actions following his appearance on the "Coz" Carson radio show to discuss racial tensions within the police department and his appearance on a local television news program to discuss threats he had received because of his comments. The Magistrate Judge found that plaintiff had engaged in protected speech addressing a matter of public concern and that the plaintiff's interest in this speech outweighs the City's interest in discipline, mutual respect, trust and efficiency. The Magistrate Judge also found, however that plaintiff failed to present sufficient admissible evidence to create a genuine issue of material fact that plaintiff's speech was motivating factor for any adverse employment decisions.

Plaintiff's objection to this finding cites numerous adverse actions taken against plaintiff. Plaintiff argues that he was sufficiently shown that his speech was a motivating factor because "of the six officers who filed EEOC claims against Riverdale on two participated on the radio show," defendant took action to terminate those two (including plaintiff) but promoted "two lesser qualified police officers... who filed EEOC complaints in 2004 and 2005." Having reviewed the portions of the record cited by plaintiff in his response to defendant's motion for summary judgement, the court finds that the cited evidence does not create a question of fact as to the decision maker's knowledge of the speech or whether it was a substantial motivating factor in any of the alleged adverse actions. Rather, plaintiff's assertions are merely speculative and the record

does not support the inferences or comparisons plaintiff attempts to make.

Therefore, plaintiff's Objection No. 5 is OVERRULED.

Objection No. 6

The magistrate Judge erroneously concluded that plaintiff did not present any evidence which showed defendants Martin, Jessie, Knox and Wallace violated his constitutional rights.

Plaintiff argues that he was presented sufficient evidence to support his due process and equal protection claims against defendants Martin, Jessie, Wallace and Knox. Plaintiff refers the court to previously cited evidence but does not address any of the Magistrate Judge's legal reasoning.

With regard to defendant Jessie, the Magistrate judge found that plaintiff failed to show that defendant Jessie had any role in the alleged adverse employment decisions or that defendant Jessie's alleged affirmation of Chief Knox's decisions violated the Due Process or Equal Protection clauses. The court agrees with the Magistrate Judge that plaintiff's equal protection claim is analyzed using the same elements as a Title VII claim. See Snider v. Jefferson State Community College, 344 F.3d 1325 m/4 (11th Cir. 2003). Furthermore, the court already has determined that plaintiff failed to show that the defendant's legitimate, nondiscriminatory reasons

were mere pretext. Therefore, plaintiff's objection the R & R with regard to his equal protection claim against defendant Jessie is without merit.

Likewise, plaintiff's objection with regard to his due process claim also is without merit. Plaintiff fails to point the court to any evidence that he was deprived of any liberty interest, but instead, seems to rely solely on his demotion and failure to promote to captain or assistant police chief. It is undisputed that individuals appointed to the rank of captain, major or chief "serve at the will and pleasure of the Chief of Police... [and]... has no vested right to the position nor does he/she have a right of grievance or appeal if reassigned to his/her former position or rank within the Department." Therefore, plaintiff had no property right in the position of captain or assistant chief of police. Accordingly, plaintiff fails to show how he was deprived of any property interest without due process. See Shelton v. City of Atlanta, 796 F.2d 1391 (11th Cir. 1986); Moore v. Otero, 557 F.2d 435, 437 (5th Cir. 1977).

Furthermore, with regard to plaintiff's due process and equal protection claims against defendants martin and Wallace, these claims rest on allegations of adverse actions that predate plaintiff's execution of the Release. Therefore, the court already has determined that these claims are barred in this action.

Finally, plaintiff asserts an equal protection blame against defendant Knox based on plaintiff's

demotion to sergeant and his failure to promote to captain. The court already has determined that plaintiff's Title VII claims based on the same allegations is subject to summary judgment. Therefore, plaintiff's equal protection claims also fail for the same reasons. See Snider, 344 F.3d 1328 n. 4.

Objection No. 7

The Magistrate Judge erroneously concluded that the individual defendants are protected by qualified immunity.

Plaintiff argues that the individual defendants are not protected by qualified immunity because "federal laws in this circuits [sic] which prohibited employment retaliation and discrimination have long been established by the courts and lawmakers." Whether applicable law was clearly established is a "fact specific" inquiry. See Rogers v. Horsely, 39 F.3d 308, 311 (11th Cir. 1994). "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." Id.

Plaintiff fails to point the court to any factually analogous cases that would give notice that the defendants' actions clearly violated plaintiff's rights. Rather, plaintiff continues to rely "on general conclusory allegations and broad legal truisms." Without more, this court finds that the individual defendants are entitled to qualified immunity, especially in light of this court's determination that

plaintiff has failed to establish any violations of Title VII.

Accordingly, plaintiff's objections No. 7 is OVERRULED.

Objection No. 8

Plaintiff [sic] is not entitled to sanctions because the pre-released claims were dismissed without prejudice.

Defendants Martin, Jessie, and Wallace filed a motion for sanctions pursuant to Fed. R. Civ. P. 11 against plaintiff and plaintiff's counsel. The motion included evidence that the notice required by Fed. R. Civ. R. 11(c) (1) (a) was given prior to the filing of the motion for sanctions. The Magistrate Judge recommended granting the motion for sanctions because "[plaintiff included claims without any reasonable factual or legal basis after having time for investigation and research." The Magistrate Judge specifically noted that "Plaintiff's response in opposition to the two summary judgement motions included claims that had previously been dismissed from this case in the Court's November 14, 2005 order and claims that had been waived by Plaintiff."

Plaintiff objects to the Magistrate Judge's R & R with regard to sanctions on the sole ground that "the court dismissed the pre-Release claims without prejudice and plaintiff had a right to urge the court to reconsider its dismissal order during the summary

judgment proceedings." Plaintiff makes no reference to defendants' argument with regard to the defendants Jessie or Wallace, or the Magistrate Judge's R & R, referencing a lack of factual or legal basis for plaintiff's claims.

While the magistrate Judges October 18, 2005 Non-final R & R states that it is "denying without prejudice" defendants' "motion for summary judgment" as it relates to defendants' arguments regarding the Release, the R & R also granted defendants' motion to dismiss plaintiff's first through fourth EEOC charges for failure to receive an EEOC Right to sue letter. On October 28, 2005, plaintiff filed an objection to the Magistrate Judge R & R as to his third and fourth EEOC charges only, attaching a copy of his April 22, 2005 right to sue letter. On November 14, 2005, the court issued an order adopting the Magistrate Judge's R & R except as to the third and fourth EEOC charges. The November 14, 2005 order unequivocally dismissed plaintiff's claims related to his first and second EEOC charges as 'without prejudice."

Plaintiff never brought any purported inconsistency with the language of the Magistrate Judge's non-final R & R to the court's attention nor did plaintiff ask for reconsideration of the court's November 14 Order. Furthermore, in continuing the assert claims that predated the Release and were the subject of his second EEOC charge in plaintiff's response to defendant's motion for summary judgment, plaintiff does not acknowledge the prior

dismissal of these claims or make any argument for the continued and/or renewed consideration of these claims despite their previous dismissal.

Therefore, having reviewed the arguments of the parties on defendants' motion for Rule 11 sanctions, as well as the Magistrate Judge's R & R and plaintiff's objection thereto, the court finds that sanctions are warranted under the circumstances of this case. Accordingly, plaintiff's objection No. 8 is OVERRULED.

For all the foregoing reasons, the court hereby OVERRULES plaintiff's objections to the R & R [docket no. 105] and ADOPTS the Magistrate Judge's R & R [docket no. 104] GRANTING defendants' motion for Rule 11 sanctions [docket nos. 46, 47 and GRANTING defendants' motion for Rule 11 sanctions [docket no. 65] is GRANTED. This matter is REMANDED to the Magistrate Judge for a hearing on the sanction award.

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Summary

(1) Magistrate Judge's Report and Recommendation [docket no. 104] granting defendants' motions for summary judgement [docket nos. 46, 47] and defendants Jessie, Martin and Wallace's motion for Rule 11 sanctions [docket no. 65] is **ADOPTED** and incorporated herein as if fully set forth.

(2) Plaintiff's objections to the R & R [docket no. 65] are **OVERRULED.** (3) Defendants' motion for motions got summary judgment [docket nos. 46, 47] is **GRANTED.**

(3) Defendants' motion for Rule 11 sanctions [docket no. 65] is **GRANTED.** This is **REMANDED** to the Magistrate Judge for a hearing on the sanction award.

SO ORDERED, this 29th day of March, 2007.

Signed

G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT JUDGE

Appendix E

MAGISTRATE'S R&R

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PHILLIP R. NEELEY

Plaintiff,
vs.

CIVIL ACTION FILE
No. 1:05-cv-1930-GET

CITY OF RIVERDALE, IRIS JESSIE, THETUS A KNOX, T. MICHAEL MARTIN, and WANDA WALLACE,

Defendants.

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

This case is presently before the Court on Defendants Iris Jessie, Thetus Knox, T. Michael Martin and Wanda Wallace's Motion for Summary Judgment, Defendant City of Riverdale's Motion for Summary Judgment, Defendants' Motion for Rule 11 Sanctions, Defendants' Motion to Strike Plaintiff's Response to Reply Brief. Docket Entries [46, 47, 65, 68, 103].

Defendants Iris Jessie, Thetus Knox, T. Michael Martin, and Wanda Wallace filed their Motion for Summary Judgment on April 10, 2006. Docket Entry [46]. On April 10, 2006 Defendant City also

filed a separate Motion for Summary Judgment. Docket Entry [47]. Defendants City, Jessie, Knox, Martin, and Wallace then filed a Motion for Rule 11 Sanctions on June 1, 2006. Docket Entry [65]. On July 12, 2006, Plaintiff filed an Amended Brief in Support of Response to Motion for Summary Judgment and Motion for Rule 11 Sanctions. Docket Entry [72]. Thereafter, Defendants City, Jessie, Knox, Martin, and Wallace filed Reply Brief in Support of their summary judgment motions on July 21, 2006, and Plaintiff filed a Response to Reply Brief on July 26, 2006. Docket Entries [98, 100].

Defendants City, Jessie, Knox, Martin, and Wallace also filed a Motion to Strike Portions of Plaintiff's Affidavit on June 15, 2006. Docket Entry [68]. On July 25, 2006, Plaintiff submitted a Response to Motion to Strike Portions of Plaintiff's Affidavit, and on August 1, 2006, Defendants filed a Reply to Plaintiff's Response to Motion to Strike Portions of Plaintiff's Affidavit. Docket Entries [99, 102].

Finally, on August 18, 2006, Defendants filed a Motion to Strike Plaintiff's Response to Reply Brief in Support of Motions for Summary Judgment. Docket Entry [103]. Plaintiff did not respond to this motion.

For the reasons outlined below, Defendants' Motion to Strike Plaintiff's Response to Reply Brief in Support of Motions for Summary Judgment is **GRANTED**, and Defendants' Motion to Strike

Portions of Plaintiff's Affidavit is **DENIED.** Docket Entries [68, 103]. Additionally, **IT IS RECOMMENDED** that Defendants Martin, Jessie, Knox, and Wallace's Motion for Summary Judgment, Defendant cites Motion for Summary Judgment, and Defendants' Motion for Sanctions be **GRANTED.** Docket Entries [46, 47, 65].

DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S RESPONSE TO REPLY BRIEF IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT

Defendants move this Court to strike Plaintiff's Response to Reply brief. Docket Entry [103]. Defendants argue that Plaintiff's Response is improper, because Plaintiff did not receive permission from the Court to file this pleading, and it is not authorized by the Federal Rules of Civil Procedure or the Northern District of Georgia's Local Rules. See Local Rule ("LR") 56, 1, N.D. Ga. Plaintiff has not responded to Defendants' Motion to Strike. Based on the Court's review of the law and local rules, the Court agrees with Defendants and, therefore, **GRANTS** Defendants' Motion to Strike Plaintiff's Response to Reply. Docket Entry [103].

DEFENDANTS' MOTION TO STRIKE PORTIONS OF PLAINTIFF'S AFFIDAVIT

Defendants also move this Court to strike portions of paragraphs 10, 11, and 13 of Plaintiff's affidavit, which was filed on May 5, 2006. Docket

Entry [68]. Defendants argue that statements in these paragraphs directly contradict Plaintiff's clear answers to unambiguous questions asked in his December 6, 2005 deposition. (Defendants' Brief in Support of Their Motion to Strike Portions of Plaintiff's Affidavit and 1.) Responding in opposition, Plaintiff argues that Defendants fail to show any direct conflicts between his deposition testimony and his affidavit. (Plaintiff's Response to Motion to Strike Portions of Plaintiff's Affidavit at 2). For the following reasons, the Court **DENIES** Defendants' motion to strike.

The prevailing view in the Northern District of Georgia is that the proper method for challenging the admissibility of evidence offered in opposition to summary judgment is to file an objection rather than a Rule 12 (f) motion to strike, because affidavits are not included in the category of pleadings that may be subject to a motion to strike. See Fleming v. Universal-Ruled Corp., 68 F. Supp. 2d 1329, 1330 n. 1 (N.D. Ga. 1999); Pinkerton and Laws Co. V. Roadway Express. Inc., 650 F. Supp. 113, 1142 (N.D. Ga 1986); Smith v. Southeastern Stages, Inc., 479 F. Supp. 593 (N.D. Ga. 1977). Therefore, the court will assess the admissibility of evidence presented through affidavits, declaration, deposition, or any other method and the objections thereto as part of its assessment of the summary judgment motions. The Court will then rule on the evidence implicitly in the consideration of the motion. See Friedlander v. Troutman, Sanders, Lockerman & Ashmore, 595, F. Supp. 1442 (N.D. Ga. 1984). Consequently, the

Defendant's Motion to Strike is **DENIED.** Docket Entry [68].

DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On July 25, 2005, Plaintiff filed this action against Defendants, alleging descrimination based on race and gender and retaliation for having filed charges with the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1988, 42 U.S.C. § 1991, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"), as well as violations of his rights under the First and Fourteenth Amendments to the United States Constitution. (See generally Compl.). On November 14, 2006, the Court dismissed Plaintiff's claims arising out of Plaintiff's first and second EEOC Charges, namely EEOC Charge No. 110-2004-02014 (Charge 2014), filed on March 2, 2005, and EEOC Charge No. 110-2004-03114), filed on May 17, 2005. Docket Entry [26].

Defendants have now filed two summary judgment motions. Defendant City argues that Plaintiff's claims against it fail as a matter of law, because Plaintiff cannot show that its legitimate nondiscriminatory reasons for not promoting him to assistant chief of police or captain, demoting him to sergeant, issuing him two written reprimands, conducting an internal affairs ("IA") investigation

into his conduct, and Chief Knox's treatment of him in staff meetings are mere pretexts for racial or sexual discrimination or retaliation. (Defendant City's Motion for Summary Judgment [hereinafter "DMS"] at 16-24). Moreover, Defendant City and Defendants Martin, Jessie, Knox, and Wallace argue that Plaintiff's retaliation claims for his exercise of his First Amendment free speech rights against the City and Chief Knox fail as a matter of law, because Plaintiff's speech to Chief Knox about the mileage on his police car does not involve a matter of public concern, and because the City's interest in efficiency and the smooth operations of the police department greatly outweigh Plaintiff's interest in his speech. (Defendants Jessie, Knox, Martin, and Wallace's Brief in Support of their Motion for Summary Judgment [hereinafter "Individ. Defs.' MSJ"] at 10-5). The individual Defendants further contend that (1) qualified immunity protects them from liability for all of Plaintiff's claims; (2) Plaintiff's Fourteenth Amendment claims against Mr. Martin, fail, because Plaintiff released those claims as part of the November 2, 2004 Release; (3) Plaintiff cannot maintain a Title VII claim against her; (4) Plaintiff has not alleged any actionable constitutional claims against Ms. Jessie, because she did not participate in the adverse actions about which Plaintiff complains; (5) Plaintiff's Fourteenth Amendment claims against Chief Knox fail, because Plaintiff did not utilize his grievance rights to appeal any of the employment decisions; and (6) Plaintiff has not shown any constitutional violations or clear and convincing evidence that he deserves punitive damages.

(Individ. Defs' MSJ at 2-10, 15-16).

Responding in opposition to both of the summary judgment motions, Plaintiff contends that summary judgment Is not warranted on his Title VII retaliation claims, because he can articulate a prima facie case and show that Defendant's proffered reasons are pretexts for retaliation. Plaintiff further argues that genuine issues of material fact exist in relation to his racial and sexual discrimination claims against Defendant City and his Equal Protection claim against Chief Knox, because Chief Knox demoted Plaintiff from captain to sergeant on March 2, 2005, replaced Plaintiff with a less qualified white officers to captain. (Plaintiff's Amended Brief in Support of Response to Motion for Summary Judgment and Motion for Rule 11 Sanctions [hereinafter "Pl. Resp."] at 31, 4041). Plaintiff argues that he can articulate a prima facie case for his first Amendment retaliation claims, because (1) racial discrimination is a matter of public concern; (2) Plaintiff engaged in constitutionally protested activity when he appeared on the Coz Carson radio show and in a televised news interview; (3) he can show a casual connection between his speech and the adverse actions; and, (4) Plaintiff's interest in his speech outweighs the City's interesting efficient public service (Pl. Resp. At 32-35). Additionally, Plaintiff contends that his constitutional claims survive summary judgment, because (1) Chief Knox, Ms. Jessie, and Ms. Wallace are liable for violating Plaintiff's free speech rights, because each took actions against him because of his

public speech; (2) Mr. Martin violated Plaintiff's Due process rights by ordering the City to suspend Plaintiff for three days based on previously un-alleged ground; (3) Ms. Jessie violated Plaintiff's Due Process rights by not following the City's personnel rules in relations to the assistant chief and captains vacancies; (4) Ms. Wallace violated Plaintiff's Equal Protection rights when she told him "I will get you" and hired Chief Knox as police chief; and (5) qualified immunity does not apply. (Pl. Resp. At 35-41).

In Defendants' Reply, Defendants further argue that (1) Plaintiff abandoned his harassment claim; (2) Plaintiff fails to respond to its legitimate, nondiscriminatory reason for not promoting Plaintiff to assistant chief and admits that his suspension occurred on July 2, 2004; (3) Plaintiff's free speech claims fail as a matter of law, because Plaintiff based it solely on actions that occurred prior to his November 2, 2004 Release and he fails to show that he can articulate any of the steps of the Pickering balancing test; (4) Plaintiff based his § 1983 claim against Mr. Martin, solely on actions that occurred prior to his Release and fails to show that Mr. Martin violated his Due Process rights; (5) the two statements that Plaintiff alleges Ms. Wallace made are not evidence of a constitutional violation, they occurred before Plaintiff's Release, and one of the statement is inadmissible double hearsay; and, (6) Plaintiff's Due Process and Equal Protection claims against Ms. Jessie fail as a matter of law, because she had no role in any of the employment decisions

at issue and Plaintiff has been shown that her actions violated the Fourteenth Amendment. (See generally Defendants' Reply Brief in Support of Their Motions for Summary Judgment [hereinafter "Defs. 'Reply"]).

I. STATEMENT OF ACTS[1]

Plaintiff, and African-American man, was hired by Defendant City as a patrol of officer on January 14, 1998. (Defendants' Statement of Material Facts as to Which No Genuine Issue exists for Trial [hereinafter "DSMF"] 1; Affidavit of Phillip R. Neely, May 4, 2005 [hereinafter "Pl. Aff."] ¶ 1). In August 2002, then-Police Chief Mike Edwards promoted Plaintiff to the rank of police captain. (DSMF 2; Pl. Aff. ¶2)

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[1]All facts taken directly from Defendants' Statement of Undisputed Facts have either been admitted or remain undisputed by Plaintiff. This court must accept as admitted those fats in the moving party's statement that have not been "specifically controverted" with citation to the relevant portions of the record by the opposing party. Local Rule 56. 1B(2), (3), N.D. Ga. Consequently, subjective perceptions, conclusory allegations, or allegations that are otherwise unsupported by record evidence do not create genuine issues of material fact in order to withstand summary judgment. See Chapman v. Al Transp., 229 F.3d 1012, 1051 n. 34 (11th Cir. 2000) (en banc); Wood v. City of Lakeland, 203 F.3d 1288, 1292 (11th Cir. 2000); Holifield v. Reno, 115 F.3d 155, 1564 n.6 (11th Cir. 1997)

In the City, ranks of captain and above are discretionary, appointed positions. (DSMF ¶ 3). The police chief has complete authority to select the individuals for these positions and can reclassify or remove the higher rank at any time and for any reason. (DSMF ¶ 3). This type of reclassification is not subject to the City's grievance process, because employees do not have a vested right in these appointed positions (DSMF ¶ 4). The City has a chain-of-command style grievance process; employees first notify their direct supervisors of the issue and then go up through the ranks to the department head. (DSMF ¶ 5). If the outcome of the grievance process does not satisfy the employees, he can appeal it to the City Manager. (DSMF ¶ 6). Plaintiff has not used the City's grievance process to complain about the actions in this case (DSMF ¶ 7).

On February 11, 2004, Plaintiff appeared on a local radio show, the "Coz Carson" show, where he discussed racial employment discrimination in the City's police department and the findings of the United States Department of Justice report on racial tensions in the City's police department. (Pl. Aff. ¶ 3). Chief Edwards opened an 1A investigation on or around February 13, 2004. (Pl. Aff. ¶ 5). On March 5, 2004, Plaintiff filed EEOC Charge 2014, alleging that the 1A investigation was racially discriminatory and retaliatory. (DSMF ¶ 9; Deposition of Phillip R. Neely, December 6, 2005 hereinafter "Pl. Dep." at 24-26). On or around May 12, 2004, Mr. Sylvester Murray, one of two interim co-managers for the City, terminated Plaintiff's employment, (Pl. Aff. ¶ 7). On

May 17, 2004, Plaintiff filed EEOC Charges 3114, alleging that his termination was discriminatory and retaliatory. (DSMF ¶ 11; Pl. Dep. At 26). Plaintiff also appealed the termination, pursuant to the City's grievance process. (DSMF ¶ 12). After a hearing on June 25, 2004, the City's hearing officer, Defendant T. Michael Martin, issued an order on July 2, 2004, reinstating Plaintiff's employment. (DSMF ¶ 13). The July 2, 2004 order also provided that the City suspend Plaintiff for three days (Pl. Aff. ¶ 9; Pl. Dep. At 27-28).

In June 2004, the City hired Defendant Iris Jessie, an African-American woman, as the new City manager. (DSMF ¶ 17). Chief Edwards resigned from the police department in 204, and on September 27, 2004, the city hired Defendant Thetus Knox, an African -American woman, as the new chief of police. (DSMF ¶ 18; Pl. Aff. ¶ 10). Miss Jeffie made the decision to hire Ms. Knox. (DSMF ¶ 20). At that time, Plaintiff held the rank of captain and had also applied for the chief of police position. (DSMF ¶ 19; Pl. Aff. 10). Less than one week later, on or around November 2, 2004, Plaintiff settled EEOC Charge 2014, filed on March 5, 2004, and EEOC Charge 3114, filed on May 17, 2004, with the City. (Pl. Aff. ¶ 9; DSMF ¶ 16). Pursuant to the settlement agreement, Plaintiff signed a General Release and Indemnity Agreement ("Release") on November 2, 2004. (See Pl. Dep. At 30-31, Exh. 3, General Release and Settlement Agreement, November 2, 2004 [hereinafter "Release"]. The City also reached settlements with four of the five other

African-American police officers who had claimed that the City had discriminated against them on the basis of their race.[2] (DSMF ¶¶ 2, 16).

November 2004, the Cityi posted a vacancy for the position of assistant police chief (DSMF ¶ 45). On or around November 10, 2004, Plaintiff submitted a letter of interest for the position. (Pl. Aff. ¶ 11). Chief Knox wrote Plaintiff two letters on November 30, 2004. (DSMF ¶ 46). Chief Knox's first letter acknowledged Plaintiff's application. (DSMF ¶ 46; Pl. Dep. At 34. Exh. 5, Letter from Chief Thetus Knox to Phillip Neely, November 30, 2004, [hereinafter {First Nov. 30, 2004 Letter"]). Chief Knox's second letter stated that "[p]ersonnel records indicated that [Plaintiff] received a three (3) day suspension in July of [2004]. If [Plaintiff] were selected as a result of the process, [he] could not be promoted, "Because it would violate Rule I, section 1 of the Personnel Handbook". (DSMF ¶ 46; Pl. Aff. ¶ 11; Pl. Dep. At 35, Exh. 6, Letter from Chief Thetus Knox to Phillip Neely, November 30, 2004 [hereinafter "Second Nov. 30, 2004 Letter"]). Chief Knox's second letter further provided that Plaintiff had the option of completing the process in spite of his ineligibility for promotion. (Knox Dep. At 92). Rule 9 provides that only employees who have not been suspended for cause within the past twelve months are eligible for promotion. (DSMF ¶ 47). Plaintiff was familiar with this rule before applying for the assistant chief position. (DSMF ¶ 48). When Plaintiff received Chief Knox's letter, he wrote Chief Knox, withdrew himself from consideration for the

assistant chief position, and thanked her for the opportunity, (DSMF ¶ 50; Pl. Dep. At 37-38, Exh. 7, Letter from Phillip Neely to Chief Thetus Knox, December 2, 2004 [hereinafter "Dec. 2, 2004 Letter"]). Plaintiff did not speak to Chief Knox to try and challenge the conclusion about his position.

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[2]The other police officers who reached settlements with the City were Mr. Gregory Barney, Mr. Leslie Watson, Mr. Brian Freeman, and Mr. Willie Johnson (DSMF ¶ 16).

Suspension. (DSMF ¶ 51).

The City assembled an independent chief position. (DSMF ¶ 52). All of the members of the panel ranked Mr. Samuel Patterson, an African-American man, the highest, and the panel unanimously recommended to Chief Knox that she hire him for the position. (DSMF ¶¶ 52, 55). Asst. Chief Patterson served for six years in the Army, is an Airborne Ranger, and is a Vietnam veteran. (DSMF ¶ 53). Asst. Chief Patterson also worked for City of Atlanta Police Department for over eighteen years and was the major over Zone 4, where he supervised approximately 115 people. (DSMF ¶ 53). Asst. Chief Patterson had never met any of the panel decision-makers prior to his interview for the assistant police chief position. (DSMF ¶ 54). Chief Knox accepted the panel's recommendation and hired Asst. Chief Patterson as the new assistant police chief. (DSMF ¶ 55).

After Chief Knox began acting as police chief, she

started holding weekly command staff meetings (Affidavit of Thetus A. Knox, April 6, 2006 [hereinafter "Knox Aff."} ¶ 3). The chief, assistant chief, majors, and captains attended these meetings. (Knox Aff. ¶ 3). Plaintiff claims that during the staff meetings, Chief Knox asked Plaintiff more questions and was harder on him than on other commanders. (DSMF ¶ 40). Other officers, disagree, testifying that Chief Knox did not treat Plaintiff any differently during staff meetings. (DSMF ¶ 41). In one of Chief Knox's first command staff meetings, she questioned Plaintiff about the low mileage she had observed on his police vehicle. (Knox Aff. ¶ 3). According to Chief Knox, she checked the mileage totals for all police department vehicles to ensure that captains were following one of her previous orders, directing captains to patrol on the street with their officers (DSMF ¶ ¶ 26, 27; Knox Aff. ¶ ¶ 2, 3). Plaintiff responded that if Chief Knox did not believe him, she could come ride with him. (DSMF ¶ 28). Chief Knox considered the comment, especially in the context of a command staff meeting, to be insubordinate. (DSMF ¶ 29). According to Plaintiff, Chief Knox began "yelling and screaming," statements such as "You don't talk to me like that. I'm the chief of police. Who do you think you are." (Pl. Dep. At 53). Plaintiff testifies that he found these statements insulting and embarrassing. (Pl. Dep. At 53-54). Major Barney issued Plaintiff reprimand for the incident. (DSMF ¶ 31).

Plaintiff also received a written reprimand in relation to his investigation of a child's claim that

her mother whipped her. (Pl. Dep. At 55). Plaintiff had been the senior officer investigating the child's abuse claim and had decided not to charge the mother with crime. (DSMF ¶ 32). The next day, the child went to school with black and blue marks on her body. (DSMF ¶ 33). Major Barney issued Plaintiff a written reprimand for failing to follow the child abuse laws (DSMF ¶ ¶ 33, 34).

In another staff meeting, Plaintiff admitted that he had recently spoken to a felony suspect on the telephone, but had not taken steps to apprehend him. ((DSMF ¶ 38). Plaintiff's statement promoted Chief Knox to open an internal affairs ("1A") investigation into Plaintiff. ((DSMF ¶ 37; Pl. Dep. At 59). When questioned, Plaintiff claimed that he did not know that the person had a felony warrant outstanding, but the 1A investigation later determined that Plaintiff had been untruthful about his in-person contact with the suspect. ((DSMF ¶ 38). Based on Plaintiff's inappropriate behavior Plaintiff was found guilty of dereliction of duty, dishonesty, and several other violations of departmental policy. ((DSMF ¶ 39). On or around March 28, 2006, Plaintiff states that Chief Knox suspended him for five days in relation to his contact with and statements about the suspect. (Pl. Aff. (DSMF ¶ 14).

On or around December 12, 2004, Plaintiff filed EEOC Charge No. 110-2005-00984 ("charge 984), alleging that he was being harassed by the new police chief and that he was not selected for the

assistant police chief position because of his race, sex, and in retaliation for his previous EEOC activity. ((DSMF ¶ 22; Pl. Dep. At 39, Exh. 8, EEOC Charge No. 110-2005-00984, December 12, 2004 [hereinafter "EEOC Charge 984"]). Plaintiff supplemented Charge 984, February 3, 2005. ((DSMF ¶ 23; Pl. Dep. At 40, Exh. 9, Supplement to EEOC Charge 984, February 4, 2005 [hereinafter "EEOC Charge 984 Supp."]). The February 4, 2005 supplement is the same as the original charge, but adds one sentence, which states that "[o]n February 2, 2005. [Plaintiff] received a written reprimand and was threatened to be demoted." ((DSMF ¶ 24). Plaintiff complains that he received a written reprimand for the command he made to Chief Knox during one of her first command staff meetings in relation to the mileage on his car. ((DSMF ¶ 25).

When Chief Knox began as chief of police, she also wanted to spend about six months studying the police department before reorganizing it. ((DSMF ¶ 57). With the approval of the City Council, Chief Knox constructed a reorganization, which included restructuring various departments and better aligning tasks, supervisors, and structure. (DSMF ¶ ¶ 56, 57). Chief Knox eliminated the major's position in the criminal investigation division. (DSMF ¶ 58). Consequently, Mr. Paul Weathers, a white man, was reclassified from a major down to a captain. (DSMF ¶ 58). The City had employed Capt. Weathers longer than Plaintiff and, at one time, Capt. Weathers had been the assistant police chief. (DSMF ¶ 59).

Additionally, Chief Knox's reorganization plan included personnel reclassification through promotions and demotions (See Pl. Aff. ¶ 63, Exh. 48). On March 2, 2005, both Plaintiff and Mr.. Robby Jones, a white man, were demoted from captain to sergeant. (Pl. Dep. At 43, 143, Exh. 11; Pl. Aff. ¶ 63, Exh. 48). Two other officers, Mr.. Watson, and African-American man, and Ms. Lisa Presley, a Hispanic woman, were promoted from sergeant to captain (DSMF ¶ 64). Ms. Presley had served as a Marine for seen years, and she had been employed by the Savannah police department for two years and by the City for five years. (DSMF ¶ 64). Asst. Chief Patterson assigned Ms. Presley to assume leadership over Mr.. Jones' team, and Mr.. Watson became responsible for Plaintiff's team. (DSMF ¶ 65). On or about March 4, 2005, Plaintiff filed EEOC Charge No. 110-2005-01786 ("Charge 1786"), alleging that he was demoted in retaliation for his having filed Charge 984. (DSMF ¶ 66; Pl. Dep. At 41 Exh. 10, EEOC Charge No. 110-2005-01786, March 4, 2005 [hereinafter "EEOC Charge 1786"]). Charge 984 does not specifically allege discrimination. (See DSMF ¶ 67; Pl. Resp. To DSMF ¶ 67).

November 2005, Mr.. Christopher Kent, a captain, resigned from the police department, and Chief Knox promoted Mr.. Ed Mashburn, a white man, to captain. (See DSMF ¶ 71; Pl. Resp. To DSMF ¶ 71). Captain Mashburn and Plaintiff had previously been promoted from patrol officer to sergeant around the same time. (See DSMF ¶ 71; Pl. Resp. To DSMF ¶ 71). Capt. Mashburn has over fifteen years

experience in law enforcement. (DSMF ¶ 69). Additionally, in late 2005, Mr. Terry Harget, a white man, was promoted to captain when Mr. Watson resigned. (See DSMF ¶ 74). Capt. Harget has been a sworn police officer since approximately 1992. (DSMF ¶ 72). After beginning to work for the City in 2000, Capt. Harget earned the highest score on the sergeants test and was promoted to sergeant in 2003. (DSMF ¶ 73).

II. CONCLUSIONS OF LAW

A. Summary Judgment Standard

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED R. CIV. P. 56. At the summary judgment stage, the court must examine all evidence in the light most favorable to the nonmoving party and the reasonable inferences therefrom and resolve all reasonable doubt in her favor. Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1199 (11th Cir. 2001); Earley v. Champion Int'l Corp., 907 F2d 1077 (11th Cir. 199).

On a motion for summary judgement, "[t]he moving party bears the initial burden to show by reference to materials on file that there are no

genuine issues of material fact that should be decided at trial." Clark v. Coats & Clar. Inc., 929 F.2d 604, 608 (11th Cir. 1991). An issue is not genuine if it is unsupported by evidence or created by evidence that is "merely colorable" or not significantly probative. "Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 250 (1986). Likewise, a fact is only material if it is an essential element of the plaintiff's case under controlling substantive law. Id. At 248. Once the movant has demonstrated that there are no genuine issues of material fact, the plaintiff must produce some evidence in support of her claim. Celotex Corp. V. Catrett, 477 U.S. 317, 324 (1986); Clark, 929 F.2d at 608. Mere conclusory allegations are insufficient to withstand a motion for summary judgment. Carter v. City of Miami, 870 F.2d 578, 585 (11th Cir. 1989).

If neither party can provide the existence or nonexistence of an essential element of claim, summary judgment will be granted if the movant shows that the plaintiff will be unable to meet her burden of proof at trial. Celetox, 477 U.S. at 322. The movant's burden therefore requires a "showing - - that is, pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." Id. The nonmoving party's failure to offer proof of an essential element to her case renders all facts immaterial, thus entitling the movant to judgment as a matter of law. Id. At 323.

B. The Court's November 15, 2005 Order and the November 2, 2004 Release

Plaintiff's appears to allege that Defendant City discriminated against Plaintiff on the basis of his race and sex and retaliated against him for his previous EEOC activity and speech by (1) demoting him to sergeant for one day on March 12, 2004; (2) suspending him for one day on March 12 2004 (3) placing him on paid administrative leave from February to May 2004; 4) terminating him on May 12, 2004; (5) suspending him for three days on July 2, 2004, by order of Mr. Martin; (6) failing to promote him to police chief on September 27, 2004; (7) failing to promote him to assistant police chief on November 15, 2004; (8) demoting him to sergeant on march 2, 2005; (9) failing to promote him to captain after Capts. Presley, Kent, and Watson resigned; and (10) suspending him for ten days on April 11, 2006. (See generally Compl.; Pl. Rep.). Defendants argue that the Court has already ruled that Plaintiff's claims in this case are limited to those set forth in Charge 984 and Charge 1786 and that Plaintiff admitted executing a release on November 2, 2004, that fully release the City and all its officials and employees for all types of claims through the date of the Release. (Defs.' Rely at 2 n. 2). Plaintiff contends that the Release does not prevent him from bringing suit based on the incidents in Charge 2014 and Charge 3114, because he intended to release his prior EEOC claims subject

> to the City's cessation of its practice of employment discrimination and retaliation against him and because Defendants breached the Release by continuing to discriminate and retaliate against him. (Pl. Resp. At 20, 22).

On November 15, 2005, the Court dismissed from this case Plaintiff's claims arising out of Charge 2014 and Charge 3114. Docket Entry [26]. These charges asserted claims based on Plaintiff's speech on the Coz Carson show and his March 12, 2004 termination. Because the Court has already dismissed these claims from this case, they are not actionable here.

Similarly, Plaintiff's claims that arose prior to November 2, 2004, are not actionable here, because he waived them by entering into a valid contractual Release on November 2, 2004. An employee, who knowingly and voluntarily releases his employer from liability with a full understanding of the terms of the agreement, is bound by the terms of that agreement. Puentes v. United Parcel Service Inc., 86 F.3d 196, 198 (11th Cir. 1996) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 & n. 15, 94 S. Ct. 1011, 1021, & n. 15, 39 L. Ed.2d 147 (1974)); Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1352 (GA App. 1983). As long as a waiver was knowingly, voluntary, and intelligently made, an employee may waive his constitutional rights as well as lesser rights. Miami Tele-Communications, Inc. V. City of Miami, 743 R. Supp. 1573, 1576 (S.D. Fla. 1990) (citing Fuentes v. Shevin, 407 U.S. 67, 94-95, 92 S.

Ct. 1983, 2001, 32 L.Ed.2d 556 (1972); Erie Telecommunications, Inc. V. City of Erie, 853 F.2d 1084, 1094 (3rd Cir. 1988); Conzalez v. County of Hidalgo, 489 F.2d 1043, 1046 (5th Cir. 1973)). However, as a general rule "an employee's rights under Title VII are not susceptible of prospective waiver." Gardner-Denver Co., 415 U.S. at 51-52; Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 699 (11th Cir. 1992)(explaining that the Eleventh Circuit has construed Gardner-Denver as standing for the proposition that "there can be no prospective waiver of an employee's rights under Title VII") (citing Schwartz v. Florida Board of Regents, 807 F.2d 901, 906 (11th Cir. 1987); see also Kendall v. Watkins, 998 F.2d 848, 851 (10th Cir. 1993). Plaintiff does not argue that he did not knowingly and voluntarily enter the Release or that he did not fully understand the terms of the agreement. Therefore, Plaintiff is bound by the terms of the Release.

Plaintiff argues, without citation to any legal authority, that the Release does not apply here, because he intended it to be subject to the City's cessation of it's discrimination and retaliation against him. This provision, however, does not appear in the Release. Under the terms of the Release, Plaintiff agreed "to release, acquit, and forever discharge' the City, its officers, and employees:

From all legal and equitable claims of every kind and nature... which PHILLIP NEELY may now have or which may accrue on account of or resulting from

his claims included or that could have been included in EEOC Charge Nos. 110-2004-02014 and 110-2004-03114 or any legal actions that could be brought as a result of said EEOC charges.

(Pl. Dep. At 30-33, Exh. 3, General Release and Indemnity Agreement [hereinafter "Release"] at 1, 3, 5). The Release further provides that it includes "without limitation all known and unknown claims for damages... and all other claims and damages of every kind arising from PHILLIP NEELY'S employment with the City of Riverdale up through and including the date of this Release." (Pl. Dep. At 30-33, Exh. 3, Release at 2). The Release specifically mentions claims brought under Title VII, the Civil Rights Act of 1991, 42 U.S.C. § § 1981-1988, among other statutes, and provides that it is "for the sole consideration of NINETY FIVE THOUSAND 00/100 DOLLARS ($95,000/00)." (Pl. Dep. At 30-33, Exh. 3, Release at 1-2). The Release also specifies hat Georgia law governs its construction and states that it "constitutes a complete accord and satisfaction of all claims PHILLIP NEELY may have against every party released on account of or resulting from the claims brought by him," and it provides that neither plaintiff nor his attorneys have relied upon any representations by the released parties or their counsel, insurance carriers, or other representations" or Plaintiff's unarticulated intent. Walker v. Johnson, 630 S.E.2d 70, 76 (Ga. App. 2006); Sudler v. Campbell, 550 S.E.2d 711, 714 (Ga. App. 2001). Plaintiff presents no case law or legal authority to the contrary or to show that continued

discrimination or retaliation voids his Release. Accordingly, the court finds that Plaintiff has waived his Title VII and constitutional claims, which arose before he entered into the Release.

However, the Court disagrees with Defendant's argument that the Release applies to all of Plaintiff's free speech claims. Plaintiff appeared on the Coz Carson show and in a televised interview before November 2, 2004, but some of the conduct that he alleges is retaliatory occurred after he entered into the Release. Therefore, the Court finds that the Release does not apply to those allegedly adverse actions that occurred after November 2, 2004. In summary, the Court finds that Plaintiff's claims for violations of the Fourteenth Amendment, racial and sexual discrimination and retaliation based on Plaintiff's previous EEOC activity or free speech, which rest on adverse actions predating the Release, are subject to summary judgment. The Court, therefore, will not consider such claims here.[3]

C. Plaintiff's Title VII Claims for Racial and Sexual Discrimination and Retaliation and Harassment

1. Failure to Promote to Assistant Chief of Police

Plaintiff alleges that Defendant City discriminated against him on the basis of his race and sex and retaliated against him for his previous EEOC charges by failing to promote him to assistant

police chief. Defendant argues that Plaintiff cannot articulate a prima facie case for his racial and sexual discrimination claim based on the City's failure to promote him to assistant police chief fail as a matter of law, because Defendant City had a legitimate non-discriminatory reason for selecting Mr. Patterson over Plaintiff, namely that Plaintiff's three-day suspension rendered him ineligible for promotion under the City's personnel rules and that Plaintiff did not sit for an interview for the position. (DMSJ at 17; Def. Reply at 4-5). In Plaintiff's response in opposition, Plaintiff does not address whether he can articulate a prima facie case for racial or sexual discrimination, but Plaintiff contends that Defendant's proffered reason is a pretext, because the City did not suspend Plaintiff after Mr. Martin issued his order, and because Plaintiff was qualified for the position.

Title VII prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because such individual's race, color,

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[3]Those claims include Plaintiff's allegations that (1) he was demoted to a sergeant for one day on march 12, 2004; (2) he was suspended for one day on March 12, 2004; (3) he was placed on paid administrative leave from February to May 2004; (4) he was terminated on May 12, 2004; (5) he was suspended for three days on July 2, 2004 by order of defendant Martin; (6) he was not promoted to police chief on September 27, 2004, and (7) he was told "I will get you" by Ms. Jessie. (Pl. Resp. At 21).

religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII also makes it "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment' because the employee has opposed unlawful discrimination by their employer of "has made a charge, testified, assisted, or participate in any manner in an investigation, proceeding, or hearing" concerning unlawful discrimination by his employer. 42 U.S.C. § 2000e-3(a). Claims brought under Title VII require proof of intentional discrimination. (See Standard v. A.B.E.L. Servs. Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). Absent direct evidence, a plaintiff may show intentional discrimination through circumstantial evidence based on the four-pronged test outlined in McDonnell Douglas v. Green. See Jones v. Gessemer Carraway Med. Ctr., 137 F.3d 1306, 1310 (11th Cir. 1998), opinion modified by 151 F.3d 1321 (11th Cir. 1998); see also McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802-04 (1973); Wright v. Southland Corp., 187 F.3d 1287, 1293 (11th Cir. 1999) ("the same analytical framework applies to retaliation claims as to other employment discrimination claims") (citation omitted). Under the McDonnell Douglas/Burdine framework, the plaintiff first has the burden of establishing a prima facie case of discrimination or retaliation. See McDonnell Douglas, 411 U.S. at 802; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981). To establish a prima facie case of retaliation, the plaintiff must establish that (1) he engaged in protected activity; (2) he suffered from an adverse

employment action; and (3) the adverse employment action was caused by his having engaged in protected activity. See 42 U.S.C. § 2000(e)(3)(a); Sullivan v. Nat'l R.r. Passenger Corp., 170 F.3d 1059 (11th Cir. 1999). To articulate a prima facie case of discrimination, a plaintiff must show that (1) he was a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) he was replaced by a person outside his protected class or was treated less favorably than a similarly-situated individual outside his protected class. Maynard v. Bd. Of Regents of Div. Of Univs. Of Fla. Dept. Of Educ. Ex rel. Univ. Of S. Fla., 342 F.3d 1281, 1289 (11th Cir. 2003). Courts apply a modified version of the discrimination prima facie case in failure to promote cases. Under this formula, a plaintiff must show that (1) he is a member of a protected group, (2) he was qualified and applied for the promotion; (3) he was rejected despite these qualifications; and (4) other equally or less qualified employees who are not members of the protected group were promoted See Lee v. GTE Florida, Inc., 226 F.3d 1249, 1253 (11th Cir. 2000).

If the Plaintiff meets this burden, the burden shifts to the defendant to proffer a legitimate, nondiscriminatory reason for the adverse employment action. McDonnell Douglas 411 U.S. at 802; Chapman v. Al Transp., 229 F.3d 1012 (11th Cir. 2000) (en banc). This burden is one of production, not persuasion, and is "exceedingly light." Turnes v. AmSouth Bank, N.A., 36 F.3d 1057,

1061 (11th Cir. 1994). It is sufficient if the evidence raised a genuine issue of fact as to whether the defendant discriminated against the plaintiff. Burdine, 450 U.S. at 248; Jones v. Gerwens, 874 F.2d 1534, 1538 (11th Cir. 1989). By producing a legitimate, nondiscriminatory reason, the defendants dispels the inference of discrimination, and the burden returns to the plaintiff to show that the proffered reason was merely a pretext for discriminatory or retaliatory intent. Burdin, 450 U.S. at 253; Chapman, 229 F.2d at 1024.

A plaintiff may succeed in providing pretext either by directly persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence. See Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148 (2000); Combs, 106 F.3d at 1528-30 (11th Cir. 1997); Evans v. McClaine of Ga., Inc., 131 F.3d 957, 965 (11th Cir. 1997; Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1376 (11th Cir. 1996). In deciding whether the plaintiff can survive summary judgment when trying to indirectly provide pretext, the court evaluates whether the plaintiff has demonstrated such weaknesses implausibilities, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could find them unworthy of credence. Combs, 106 F.3d at 1538. Mere conclusory allegations of discrimination without more, are insufficient to raise an inference of pretext or intentional discrimination where an employer has

offered extensive evidence of legitimate, non-discriminatory reasons for its actions. Mayfield, 101 F.3d at 1376. "If the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it." Wilson, 376 F.3d at 1088; Chapman, 229 F.3d at 1030. Courts will not second-guess an employer's business judgment. Bassano v. Hellman Worldwide Logistics, Inc., 310 F. Supp. 2d 1270, 1279 (N.D. Ga. 2003). An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984) (emphasis added); see also Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1361 (11th Cir. 1999).

Applying the law to the facts of this case, the Court finds that summary judgment is appropriate on Plaintiff's racial and sexual discrimination and retaliation claims for the City's failure to promote him to assistant chief of police. First, the Court notes that Plaintiff's response brief does not address Defendant's arguments on Plaintiff's racial and sexual discrimination claim. The Court finds that the evidence in the record and the law supports Defendant's arguments. It is undisputed that Defendant hired an individual who was a member of both of Plaintiff's protected group for the assistant chief position, namely Mr.. Patterson, an African-American man. Plaintiff has, therefore, abandoned these claims, and summary judgment in

appropriate.[4]

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[4]Local Rule 7.1B states that a '[f]ailure to file a response shall indicate that there is no opposition to the motion." Local Rule 7.1B, N.D. Ga., When a party does not 'respond to an argument or otherwise address a claim, the Court deems such argument or claims abandoned." Hudson v. Norfolk S. Ry. Co., F. Supp. 2d 1301, 1324 (N.D. Ga. 2001); see also Marion v. Dekalb Co., GA, 821 F. Supp. 685, 688, 689 fn. 4 (N.D. GA 1993); Resolution Trust Corp. V. Dunmar Corp., 43 F. #d 587, 599 (11th Cir. 1995) (en banc); Bute v. Schuller Int'l Inc., 998 F. Supp. 1473, 1477 (N.D. Ga. 1998). However, "the district court cannot base the entry of summary judgment on the mere fact that the motion was unopposed," because Federal Rule of Civil Procedure 56(e) only permits the entry of summary judgment against an adverse party who fails to respond if it is appropriate. United States v. One Piece on Real Property Located at 5800 SW 74th Ave., 363 F.3d 1099, 1101 (11th Cir. 2004); see also Dunlap v. Transamerica Occidental Life Ins. Co., 858 F.2d 629, 632 (11th Cir. 1988) (per curiam); Fed R. Civ. P. 56(e). Therefore, the Court must consider the merits of the motion to "ensure that the motion itself is supported by evidentiary materials." Id. This requires the Court review all the evidentiary materials submitted in support of the motion; however, a *sua sponte* review of all materials I the file is not necessary. Id.

Second, Plaintiff cannot show that Defendant's legitimate nondiscriminatory reason for promoting Mr. Patterson are mere pretexts. accordingly, the Court finds that Plaintiff's claim that Defendants failure to promote him to assistant chief was retaliatory and discriminatory, fails as a matter of law. Plaintiff contends that Defendant's proffered reason is a pretext, because the City did not suspend Plaintiff after Defendant Martin issued his order.

However, the pretext analysis focuses on the employer's belief and perceptions of the employee's performance. Cofield v. Goldkist, Inc. 267 F.3d 1264, 1268 (11th Cir. 2001); Standard, 161 F.3d at 1332-33 (citing Holfield, 115 F.3d at 1565)); see also Hartley v. Wisconsin Bell, Inc., 124 F.3d 887, 890 (7th Cir. 1997). An employer may take an employment action for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. Nix, 738 T.2d. At 1187; see also Damon, 196 F.3d at 1361. Regardless of whether the City actually suspended plaintiff pursuant to Mr. Martin's July 2, 2004 order, Plaintiff does not show that Chief Knox did not believe that Plaintiff had received a suspension when she wrote him a letter informing him that he was ineligible for promotion to assistant chief. It is undisputed that Mr. Martin's ordered stated that Plaintiff should receive a three-day suspension. Chief Knox testifies that the OPS Commander, Major Raymond Spivey, informed her that Plaintiff had been suspended for three days during the preceding twelve months. (Deposition of Thetus A. Knox, March 2, 2006 [hereinafter "Knox Dep."] at 92). Chief Knox further testifies that she trusted Major Spivey, and she did not independently verify his information. (Knox Dep. At 94). Chief Knox states that she may have reviewed Plaintiff's personnel file at some point before November 30, 2004. (Knox Dep. At 94). However, Chief Knox explains that if she did not find a document in Plaintiff's personnel file indicating that he had been suspended, it would mean nothing, because the City

did not "have a data base on disciplinary actions." (Knox Dep. At 94-5).

Chief Knox also states that she did not speak with any other officers, including Plaintiff, about his suspension and it is undisputed that Plaintiff never informed Chief Knox that he had not been suspended or otherwise contested her conclusion that he was ineligible for promotion. (Knox Dep. At 95-96; DSMF ¶ 51). Indeed, after Plaintiff received Chief Knox's letter notifying him of his suspension and resultant ineligibility, Plaintiff withdrew from consideration for the assistant chief position and, therefore, did not complete the selection process. (DSMF ¶ 50, Pl. Dep. At 37-38, Exh. 7, Dec. 2, 2004 Letter). Accordingly, Plaintiff does not show that Chief Knox did not actually believe that Plaintiff was ineligible for promotion. See Elrod, 939 F.2d at 1471 (explaining that employee failed to show pretext where he presented evidence suggesting that allegations were untrue, but failed to show that his employer's belief in those allegations was not credible); see also Cofield, 267 F.3d at 1268-69 (affirming summary judgment in favor of employer who promoted candidate it believe was more qualified). Because the pretext analysis centers on the employer's beliefs and whether the employer has given an honest accounting of its decisions, Plaintiff's allegation that he was not actually suspended does not show pretext.

Similarly, Plaintiff fails to show pretext through his personal belief that he was qualified for the

assistant chief position. (Pl. Resp. At 27). An employee's perception of his qualifications or the appropriateness of her discipline is not relevant to the pretext analysis. Standard, 161 F.3d at 1332-33. Employers have the freedom to make unwise, unsound, or even irrational decisions. Tarrance v. Montgomery County, 157 F. Supp. 2d 1261, 1263 (M.D. Ala. 2001). Therefore, when an employer picks between job applicants, and promotes an applicant from outside the plaintiff's protected class over the plaintiff, who is allegedly better qualified, summary judgment is appropriate unless the disparity in qualifications is "'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" Lee, 266 F.3d at 1254 (11th Cir. 2000). Plaintiff's evidence does not show it address Chief Knox's perception of Plaintiff's qualifications. Accordingly, the Court finds that Plaintiff's has not shown that Defendant's proffered reasons for not promoting Plaintiff to the assistant chief position are mere pretexts for retaliation of discrimination. The Court, therefore, **RECOMMENDS** that Defendant City's Motion for Summary Judgment be **GRANTED** as to Plaintiff's retaliatory and discriminatory failure to promote to assistant chief of police claims. Docket entry [47].

2. Failure to Promote to Captain

Plaintiff asserts that the City discriminated against him on the basis of his race and sex and

retaliation against him by promoting Capts. Mashburn and Harget to captain over him. Defendant City argues that Plaintiff's claims fail because Plaintiff never filed or supplemented a EEOC charge on this issue and because Plaintiff cannot show that Defendant's legitimate nondiscriminatory reason for promoting Capt. Mashburn and Harget are pretexts for retaliation. (DMSJ at 17-Defs.' Reply at 5-7).

Again, Plaintiff does not respond to Defendant City's summary judgment argument that Plaintiff has not exhausted his administrative remedies for this claim. The Court finds that the evidence in the record and law supports Defendant's argument. Plaintiff admits that none of his EEOC charges include his failure to promote to captain allegations. (Pl. Dp. At 113-14). See 42 U.S.C. § 2000e-5(e)(1); 29 C.F.R. § 1601.12(a)(3); Jackson v. Seaboard Coastline R. Co., 678 F.2d 992, 1010 (11th Cir. 1982) (quoting FED. R. CIV. P.9(c)); accord Griffin vs. Dugger, 823 F.2d 1476, 1482n. 12 (11th Cir. 1987; see also National R. R. Passenger Corp. V. Morgan, 536 U.S. 101, 109 (2002); Pijnenburg v. West Ga. Health Sys., Inc., 255 F.3d 1304, 1305 (11th Cir. 2001). This claim also could not be reasonabley expected to grow out of any of his other claims as it contains different events from different time periods. Alexander v. Fulton County, Georgia, 207 F.3d 1303, 1332 (11th Cir. 2000) (citing Griffin v. Carlin, 755 F.2d 1516, 1522 (11th Cir. 1985)); Mulhall v. Advance sec., Inc., 19 F.3d 586, 589 n.8 (11th Cir. 1994). Thus, the Court finds that Plaintiff

abandoned any argument that he exhausted his administrative remedies,making summary judgment proper.

Even if Plaintiff had administratively exhausted this claim, Defendant City woudl still be entitled to summary judgment, becuase Plaintiff does not show thatDefendant's legitimate nondiscriminatory reason for promoting Capts. Mashburn and Harget instead of Plaintiff are mere pretexts. Defendant City states that it promoted Capts. Mashburn and Harget to the two vacant captains positons instead of Plaintiff, becuase, in makign the promotion decisions, Chief Knox valued strong demonstrated work ethic and performance, a clear willingness to accept the new direction of the department, and a desire to assist in furthering this new direction. (DMSJ at 20; Defs.' Reply at 6). Defendant City also states that Chief Knox did not believe Plaintiff had these qualities and, in fact, believed him to be disrespectful, belligerent, and "dar[ing] the new chief to cross him." (Defs.' Reply at 6).

Defendant City has produced significant evidence in support of its proffered reason. Chief Knox testifies that in selecting officers for promotion, she looks at how well an officer motivates their people and how well the officer implements her philosophy and vision of community-oriented policing. (Knox Dep. At 113, 115). Chief Knox states that she wants officers who share her philosophy, who work with citizens and appeared to understand community-oriented policing, who treat people like the officer

who would like to be treated, who ensure that criminals are arrested, and who are respectful and work with her. (Knox Dep. At 114, 115). Chief Knox testifies that she did not want people who did not respect her position on her managerial team, and she states that she assumes "that the way people treat [her] is a way that they treat the citizens. If you're disrespectful to the Chief and you see this person every day, how are you to citizens who you meet on the street, who you are arresting or giving a citation." (Knox Dep. At 115, 153). Chief Knox further states that "if you demonstrated performance to [her] is disrespect and you're written up for insubordination[,] then how are you treating citizens." (Knox Dep. At 143).

According to Chief Knox, both Capts. Mashburn and Harget are real go-getters and demonstrated that they wanted to be a part of the team. (Knox Dept. At 141, 142). Chief Knox explains that whenever she shares an initiative with Capt. Mashburn, "he is on board, ready to go." (Knox, Dep. At 142). ON the other hand, Chief Knox, states that Plaintiff demonstrated to her that he did not want to be on her team when he talked about being on television instead of his tactics for preventing and solving crime at the first staff meeting and then when he was insubordinate at the second staff meeting. (Knox Dep. At 116-19). Plaintiff admits that he told Chief Knox about his appearance on the television in one of the first meetings, and it is undisputed that Plaintiff responded to Chief Knox's observation that the mileage was low on his patrol

car by stating "if you don't believe it, you ride with me." (DSMF ¶¶ 28, 29; Knox Dep. At 123; Pl. Dep. At 52, 71-73, 74-75). It is further undisputed that Chief Knox considered Plaintiff's response about the mileage to be insubordinate and disrespectful. (DSMF ¶¶ 28, 29; Knox Dep. At 123). Additionally, Chief Knox testifies that she expects her officers to listen to what their commanders and other officers are saying, respond when asked a question, and take a recommendation when it is given, but she states that she has not seen this behavior in Plaintiff. (Knox Dep. At 121).

Plaintiff argues that Defendant's legitimate, nondiscriminatory reasons are pretexts for retaliation, because Plaintiff was more qualified than Capts. Mashburn and Harget and Chief Knox and Ms. Jessie did not post the vacant captains positions as required by the City's Personnel Rule 5, sections 1 and 2. (Pl. Resp. At 28-19). Like Plaintiff's's argument about his qualifications for the assistant police chief position, Plaintiff's argument that he was more qualified than the individuals promoted to captain does not show pretext. Plaintiff's generalized assertion that he was more qualified than Capts. Mashburn and Harget does not show that no reasonable person could have selected them over him for promotion. See Lee, 226 R.3d at 1254 (quoting Deines, 164 F.3d at 280-81). Similarly, Plaintiff's more extensive education does not show that no reasonable person could have selected Capts. Marshburn and Harget over him. Nor does it rebut Defendant's proffered reason head-

on. Employers have the freedom to make unwise, unsound, or even irrational decisions. Tarrance, 157 F. Supp. 2d at 1263. Chief Knox clearly identified teamwork, respect for her and the citizen of the City, and a willingness to work with her and promote her philosophy as some of the attributes she sought in members of her managerial team. Knox Dep. At 113-115). Plaintiff's more extensive education does not negate the fat that Chief Knox did not believe that Plaintiff possess these attributes.

Additionally, the mere fact that Defendant may not have followed Personnel Rule 5, Section 3, which requires that all vacancies be posted internally for a minimum of five days, does not show pretext here. Although in some instances, an employer's failure to follow its own policies may show pretext, appellate courts have also recognized that an employer's failure to follow its own policy need not result in a judicial finding of pretext. The Eleventh Circuit has held that "[s]tanding alone, deviation from a company policy does not demonstrate discriminatory animus." Mitchell v. USBSI Co., 186 F.3d 1352, 1355-56 (11th Cir. 1999) (citing EEOC v. Texas Instruments, Inc., 100 F.3d 1173, 1182 (5th Cir. 1996) (holding that "deviation from company policy [is] not evidence of discrimination, absent a nexus between deviation and employee's protected status,")). The Tenth Circuit has also explained that "[t]he mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that the employer failed to follow its own internal procedures does not necessarily suggest that the employer who

motivated by illegal discriminatory intent or that the substantive reasons given by the employer for its employment decision was pretextual." See Randle v. City of Aurora, 69 F.3d 441, 454-55 (10th Cir. 1995) (citing Ingles v. Thiokol Corp., 42 F.3d 616, 623 (10th Cir. 1994) (overruled on the other grounds) ("To the extent there is any inconsistency at all [in following the employer's internal procedures], it only goes to process and not to purpose or motivation, and could not provide a sufficient basis for a jury to find pretext for age discrimination.")); see also Harris v. Niagara Mohawk Power Corp., 252 F.3d 592, 599 (2d Cir. 2001); Shorette vs. Rite Aide of Maine, Inc. 155 F.3d, 17n.8 (1st Cir. 1998); Vaughan v. MetraHealth Companies, Inc., 145 F.3d 197, 203 (4th Cir. 1998) (overruled on other grounds); Moore v. Eli Lilly & Co., 990 F.2d 812 (5th Cir. 1993) (finding that facts surrounding plaintiff's termination, including evidence that employer may have varied its normal discharge procedures, did not show pretext). Assuming that defendant failed to follow its own policy requiring that it post notice of the vacant captain positions, this failure does not directly or indirectly show pretext. It is undisputed that the police chief has complete authority to select the individuals for captain positions and can reclassify or remove the higher at any time and for any reason. (DSMF ¶ 3). Plaintiff has failed to provide even a scintilla of evidence tending to show any inconsistencies in the proffered reasons for selecting Capts. Mashburn and Harget for the vacant captain position or that any illegal animus existed. Accordingly, the Court finds that Plaintiff has not

shown that Defendant's legitimate nondiscriminatory reasons for not promoting him to captain are mere pretexts. The Court, therefore, **RECOMMENDS** that Defendant City's Motion for Summary Judgment be **GRANTED** as to Plaintiff's retaliation and discriminatory failure to promote claims. Docket Entry [47].

3. Demotion to Sergeant

Plaintiff appears to allege that Defendant City discriminated against him on the basis of his race and sex and retaliated against him by demoting him from captain to sergeant (Compl. ¶ 32; Pl. Resp. At 30-32). Defendant argues that Plaintiff's demotion claim fails, because he cannot show that Defendant's legitimate, nondiscriminatory reason for demoting Plaintiff to sergeant is a mere pretext. Specifically, Defendant contends that when Chief Knox demoted Plaintiff to sergeant is a mere pretext. Specifically, Defendant contends that when Chief Knox demoted Plaintiff, she promoted another African-American male, Mr. Watson; like Plaintiff, Mr. Watson has filed an EEOC charge and lawsuit against the City for alleged race discrimination and has settled his claim at the same time as Plaintiff. (DSMJ at 22-25; Def.' Reply at 8).

Plaintiff argues that summary judgment on his racial and sexual discrimination claims is in appropriate, because Chief Knox demoted him from captain to sergeant on March 2, 2005, promoted a less qualified white woman to captain as his

replacement, did not demote a less qualified white male, and later promoted two less qualified white males captain. (Pl. Resp. At 31-32). Plaintiff also contends that Defendant's reason for this demotion is a pretext, because (1) his performance did not merit a demotion; (2) he was more qualified than the sergeants promoted to captain, Ms. Pressley and Mr. Watson; and (3) he was more qualified than the white patrol captain, Mr. Christopher Kent, who was not demoted to sergeant. (Pl. Resp. At 27-28). The Court agrees with Defendant's contention that Plaintiff cannot show that Defendant's non-discriminatory reason for demoting Plaintiff to sergeant was pretextual.

Defendant states that it demoted Plaintiff as part of Chief Knox's reorganization of the police department shortly after she took office. (DSMJ at 23). According to Defendant, Chief Knox wanted to appoint a supervisory team of officers who were hard working, progressive, motivated, and supportive of her leadership (DSMJ at 23; Defs.' Reply at 8). Defendant states that Chief Knox did not believe Plaintiff to be supportive of her leadership, that he undermind her authority, challenged her decisions, and, therefore, she used her complete discretionary authority to reclassify him, and to white officers, as a sergeant (DSMJ at 24; Defs.' Reply at 8). As discussed above, Defendant has produced significant evidence in support of its proffered reasons. Like the pretext arguments Plaintiff advanced in support of his failure to promote claims.

Plaintiff's argument do not show pretext here. Plaintiff asserts that he was an excellent patrol captain and that his job performance did not warrant a demotion, but none of Plaintiff's evidence address Chief Knox's beliefs and perceptions of Plaintiff's performance are the focus of the pretext analysis. See Cofield., 267 F.3d at 1268; Standard, 161 F.3d at 1332-33 (citing Holifield, 115 F.3d at 1565)).

Plaintiff also asserts that he was more qualified than the two officers promoted to captain, Ms. Pressley and Mr. Watson, and on officer whose rank as captain was maintained, but Plaintiff does not show that the disparity in qualifications was so great that no reasonable person could have taken these actions. Lee, 226 F.3d at 1254 (11th Cir. 2000). Plaintiff states in his affidavit that Ms. Pressley did not meet minimum qualifications for a captain's position, but he does not state how Ms. Pressley was not qualified or demonstrate a basis for his knowledge or other foundation for this conclusion. (See Pl. Aff. ¶ 13). The Court will not cull through the materials submitted by the Plaintiff searching for evidence that shows the absence of a disputed issue or that creates a disputed issue. Plaintiff's counsel bears this obligation. See United States v. Adkinson, 135 F.3d 1363, 1378-80 (11th Cir. 1998); Johnson v. City of Fort Lauderdale, 126 F.3d 1372, 1373 (11th Cir. 1997); Dickerson v. Amoco Performance Prod., Inc., 845 F. Supp. 1565, 1570 (N.D. Ga. 1994). Plaintiff's evidence merely quarrels with the decision to demote him. The question at the pretext stage, though, is not whether it was

reasonable to disagree with the decision, but whether the decision was based on discrimination. Combs, 106 F.3d at 1543; accord Holifield, 115 F.3d at 1565. Because Plaintiff has not made this showing, the Court **RECOMMENDS** that Defendant City's Motion for Summary Judgment be **GRANTED** on Plaintiff's retaliatory and discriminatory demotion claims. Docket Entry [47].

4. Plaintiff's Harassment Claims

Plaintiff alleges that Defendant subjected him to harassment by Chief Knox on the basis of his race, sex, public speech, and in retaliation for his previous EEOC activity. (See Compl. ¶ 30; Pl. Dep. At 48-80). In Plaintiff's deposition, he contends that this harassment included a written reprimand for stating to Chief Knox in a staff meeting, "if you don't believe me, come ride with me"; a written reprimand for not charging a mother who allegedly beat her child, an internal affairs investigation into Plaintiff's contact with and statements relating to a felony suspect; and, harsh treatment during staff meetings. (See Pl. Dep. At 48-80). Defendant City argues in its summary judgment motion that Plaintiff's harassment claims fails as a matter of law, because (1) the City has a legitimate nondiscriminatory reason for the first write-up for Plaintiff's "ride with me" comment, and Plaintiff cannot show causation for the comment, because he filed charge 984 after he received the written reprimand; (2) Plaintiff received the second reprimand because he did not arrest a mother accused of child abuse as required by Georgia

law, and Plaintiff cannot show that Defendants treated him differently than any similarly situated person outside his protected class by issuing the reprimand or show causation; (3) Defendant had a legitimate reason for instituting an 1A investigation into Plaintiff's communication with a wanted felon, Plaintiff cannot show that Defendants treated any similarly situated officer outside his protected class more favorably than him, and Plaintiff cannot show causation; and, (4) Defendant did not subject Plaintiff to different treatment during staff meetings until his disruptive conduct warranted excusing him from the meetings. (DSMJ at 20-22). Plaintiff's response in opposition does not contain a separate section addressing his harassment claims. Therefore, Defendants argue in their reply brief that Plaintiff has abandoned his harassment claims by failing to respond to the arguments Defendant City made in its summary judgment motion. (Def.' Reply at 3) The Courts agrees.

Plaintiff's response does not include section specifically addressing his harassment claim. Plaintiff's only reference to his harassment claims appears in the section of Plaintiff's response addressing his retaliation claims. IN that section, he cites Defendant Knox's alleged threat to demote Plaintiff as evidence of a causal connection between his list of alleged adverse employment actions and his list of protected activities, and he argues that Defendant's proffered reason for issuing the written reprimand for insubordination is a pretext, because his invitation did not violate any written policies.

(See Pl. Resp. At 21-30). Plaintiff does not address any of Defendant's proffered reasons for the other allegedly harassing actions. Similarly, Plaintiff makes no reference to any of the alleged harassing actions or Defendant's summary judgment arguments in the section of Plaintiff's response addressing discrimination. Accordingly, the Court finds that Plaintiff has not responded to Defendant's arguments for summary judgement on his discriminatory and retaliatory hostile work environment claims. Based on the Courts review of the evidence in the record and the law, the Court finds that summary judgment is warranted on these claims, and it **RECOMMENDS** that Defendant City's Motion for Summary Judgment be **GRANTED** on Plaintiff's claims for discriminatory and retaliatory hostile work environment.[5]

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[5]The Court notes that Plaintiff alleges for the first time in his Response in Opposition brief that he suffered an adverse employment action when he was suspended for ten days on or around April 11, 2006, because of the results of the 1A investigation into his contact and statements relating to a suspect. (See Pl. Resp. At 21). This suspension occurred after Plaintiff filed his original complaint, and Plaintiff has not amended his complaint to include it See Coon v. Georgia Pacific Corp., 829 F.2d 1563, 1568-1569 (11th Cir. 1987). Plaintiff also does not state in his affidavit or reference in his brief that he has exhausted his administrative remedies on this claim. However, the Court notes that Plaintiff does not show pretext by relying on his own testimony that Chief Knox falsely stated that he had made contradictory statements. Indeed, ti is undisputed that the 1A investigation later determined that Plaintiff had been untruthful about his inperson contact with the suspect. (DSMF ¶ 38). Based on Plaintiff's inappropriate behavior, Plaintiff was

found guilty of dereliction of duty, dishonesty, and several other violations of departmental policy. (DSMF ¶ 39). Accordingly, the Court finds that to the extent that Plaintiff's complaint could be read to include this claim, Plaintiff does not show pretext.

Docket Entry [47].

D. Plaintiff's First Amendment Retaliation Claims

Plaintiff alleges that Defendants City, Knox, Jessie, and Wallace retaliated against him for exercising his First Amendment free speech rights by denying him a promotion to assistant police chief and captain, demoting him to sergeant, and subjecting him to harassment by Chief Knox.[6] Defendants contend that Plaintiff's First Amendment retaliation claims fail as a matter of law, because Plaintiff's speech is not a matter of public concern, the City's interests greatly outweigh Plaintiff's interest, and Plaintiff does not demonstrate that he can satisfy any of the steps of the Pickering balancing test, (Individ. Def.' MSJ at 10-15; Def.' Reply at 9-10, 14). In response, Plaintiff contends that he engaged in constitutionally protected speech when he commented on race discrimination in the police department during an appearance on the Coz Carson radio show and in a televised news interview, that race discrimination is a matter of public concern, that Plaintiff's interest in his speech outweighed the City's interests, and that he can show a causal connection between his speech and the adverse actions. (Pl. Resp. At 32-35).

[6]As previously noted, Plaintiff's Response assets numerous employment actions as the basis for his First Amendment retaliation claims (See Pl. Resp. At 21, 33). For the reason discussed above, Plaintiff's claim is limited to those adverse actions that occurred after November 2, 2004

Additionally, Plaintiff alleges in his response that Chief Knox, Ms. Jessie, and Ms. Wallace retaliated against him for exercising his First Amendment free speech rights, because Chief Knox demoted him, denied him promotions, suspended him, and reprimanded him; Ms. Jessie knew of and failed to stop Chief Knox's actions; and Ms. Wallace threatened him. (Pl. Resp. At 35-56).

A state may not demote or discharge a public employee in retaliation for protected speech. Watkins v. Bowden, 105 F.3d 1344. 1352 (11th Cir. 1997) (per curiam). The Eleventh Circuit applies a four-part test to determine whether an employee suffered such retaliation. McKinley v. Kaplan, 262 F.3d 1146, 1149 (11th Cir. 2001). First, the court must determine whether the employee's speech may be fairly characterized as constituting speech on matter of public concern. Watkins, 105 F.3d at 1352-53. If so, the court must weigh the employee's First Amendment interests against the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. Id. At 1353. When the employee's interests prevail in this balancing test, the fact-finder then determines whether the employee's speech played a substantial part in the decision to demote or

discharge the employee. Id. Finally, if the employee shows that the speech was a substantial motivating factor in the employment decision, the state must prove by a preponderance of the evidence that, even absent the protected conduct, it would have made the same decision. 1d. (Citing Morgan v. Ford, 6F.3d 750, 753-54 (11th Cir. 1993) (quotation marks, citations, brackets, and ellipsis omitted), cert. Denied, 512 U.S. 1221, 114 S. Ct. 2708, 129 L. Ed. 2d 836 (1994).

Applying the law to the facts of this case, the Court finds that Plaintiff has failed to carry his burden of showing that a genuine issue of material fact exists for trial, L.ED.2d 870 (1984). Additionally, Plaintiff states that he did not limit his speech to his personal complaints about race discrimination, and he used a widely disseminated public forum. Thus, the court finds that Plaintiff's speech on the Coz Carson radio show addressed a matter of public concern.

Similarly, the Court finds that Plaintiff engaged in protected speech when a Channel 2 WSB news reporter, Mark Winnie, televised an interview of Plaintiff about threats Plaintiff had received from members of the police department. (Pl. Aff. 4). Plaintiff states that he received the threat because he commented on racial tension in the department. Although personal in nature, the subject-matter also related to malfeasance or corruption by public servants. Both of these topics are generally matters of public concern. See Oladeinde v. City of

Birmingham, 963 F.2d 1481, 1486 (11th Cir. 1992) (corruption in police department is matter of public concern; Bryson v. City of Waycross, 888 F.2d 187, 193 (5th Cir. 1988) (nothing that it is clearly established that a public employee's speech revealing improper conduct by fellow employees is protected under the First Amendment). Additionally, Plaintiff's interview was part of a televised news story and was capable of being heard by a large audience. See Morgan, 6F.3d at 754 n. 5 (employee's attempt to make speech public is a relevant factor in public concern analysis). Thus, the court finds that Plaintiff's television interview addressed a matter of public concern.

Because Plaintiff engaged in speech touching on a matter of public concern, the court must weigh his First Amendment interests against the City's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. Plaintiff contends that his interest in speech outweighs the City's interest in the efficiency of the public services it performs, because his comments were consistent with the U.Sl DOJ's report on race discrimination and tension in the police department. (Pl. Resp. at 34-35). The Court agrees. Case Law establishes that although courts do not evaluate the content, or "social worth," of ideas, Williams, 639 F.2d at 1003, certain types of speech traditionally are accorded greater protection in our society by virtue of the fact that the speech goes to the heart of the democratic process. Leonard v. City of Columbus, 705 F.2d 1299, 1304-05 (11th

Cir. 1983) (citing Connick, 461 U.S. at 145; Pickering v. Board of Education, 391 U.S. 563, 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); Williams, 639 F.2d at 1003; Berdin v. Duggan, 701 F.2d at 912. Plaintiff sought to address a report by a federal agency about race relations in the City's police department and threats from the police department growing out of his publication of that report. This report and the threats concerned not only internal police matters, but matters of interest to the community-at-large as well. See Leonard, 705 F.2d at 1304-05. The public has a fundamental interest in effective law enforcement organizations that are free of discrimination. Cromer v. Brown, 88 F.3d 1315, 1328 (4th Cir. 1996). Similarly, the public has a fundamental interest in a police department that is free from malfeasance or efforts to cover up discrimination. Thus, Plaintiff's interests merged with those of the community-at-large and are substantial. Id. (Citing Leonard, 705 F.2d at 1305). As a paramilitary department, the police department has a "need to secure discipline, mutual respect, trust and particular efficiency in the ranks... different from other public employers." (Individ. Defs.' MSJ at 13-14); see also Anderson v. Burke County, Georgia, 239 F.3d 1216, 1222 (11th Cir. 2001); McKinley, 262 F.3d at 1150. Defendants, however, do not show in either their summary judgment motion or their reply brief how its interest in discipline, mutual respect, trust and efficiency in this case outweighs Plaintiff's interest in his speech on race discrimination and related threats. Thus, the Court finds that Plaintiff's interests outweighed

the City's interests.

Accordingly, the court turns to the third stage of the analysis, where Plaintiff must show that his speech was a substantial motivating factor in the employment decision. Here, Plaintiff's claims fails as a matter of law. Plaintiff argues that of the seven police officers who filed EEOC charges against the City in 2003, the City only terminated or subjected to adverse employment actions the two officers, Plaintiff and Mr. Carl Freeman, who made public comments on the radio or television. Plaintiff further argues that Chief Knox and Ms. Jessie knew of Plaintiff's public comments because they were mentioned in Mr. Martin's appeal order. (Pl. Resp. At 34). However, Plaintiff provides no fats or evidence to substantiate these comparisons. No fact-finder could conclude that Plaintiff's speech was a substantial motivating factor in any of the alleged adverse actions based on the decision maker's mere knowledge of the speech and speculative, unsubstantiated comparisons to other officers. Accordingly, the Court **RECOMMENDS** that summary judgment be **GRANTED** on all of Plaintiff's First Amendment retaliation claims against both Defendant City and the individual Defendants. Docket Entries [46, 47].

E. Plaintiff's Fourteenth Amendment Due Process and Equal Protection Claims Against Defendant Jessie

Plaintiff alleges that Ms. Jessie violated the

Fourteenth Amendment Due Process and Equal Protection Clauses by denying Plaintiff promotions to assistant police chief and to two vacant captains positions. (Pl. Resp. At 37-39). Ms. Jessie contends that Plaintiff's claims fail as a matter of law, because Plaintiff does not show that she had any role in the alleged adverse employment decisions or that her alleged affirmation of Chief Knox's decisions violated that Due Process and Equal Protection clauses. (Defs.' Reply at 12-13). The Court agrees with Defendant.

Plaintiff's's Equal Protection and Due Process claims appear before the Court through the conduit of § 1983.[7] To state a cause of action under § 1983, a plaintiff must show that a person acting under color of state law violated his constitutional rights Griffin v. City of Opa-Locka, 261 F.3d 1295, 1303 (11th Cir. 2001). The Equal Protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV, § 1. To state a § 1983/Equal Protection claim, a plaintiff must (1) allege that, "through state action, similarly situated persons have been treated disparately," and (2) "put forth evidence that [the defendants'] actions were motivated" by an unlawful factor. See Draper v. Reynolds, 3769 F.3d 1270, 1278 n. 14 (11th Cir.) (Quotations omitted), cert. Denied, 543 U.S. 988, 125 S. Ct. 507, 160 L. Ed. 2d 373 (2004). When, as here, "section 1983 is used as a parallel remedy for violation of Title VII, the elements of the two causes of action are the same.

[7]Section 1983 provides every person with the right to sue those acting under color of state law for violations of federal constitutional and statutory provisions. 42 U.S.C. § 1983. Section 1983 is merely a vehicle by which to bring these suits; it does not create any substantive federal rights. Williams v. Bd. Of Regents of Univ. Sys. Of Georgia, 441 F.3d 1287, 1301 (11th Cir. 2006); Whiting v. Traylor, 85 F.3d 581, 583 (11th Cir. 1996).

"Snider v. Jefferson State Community College, 344 F3d. 1325, 1328 n. 4 (11th Cir. 2003); see also Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). As discussed above, however, Plaintiff has failed to reveal Defendant City's legitimate, nondiscriminatory reasons for its promotion decisions to be mere pretexts. Accordingly, Plaintiff's § 1983/Equal Protection clause claim against Ms. Jessie fails as a matter law.

Plaintiff's Due Process claim against Ms. Jessie similarly fails. The Due Process clause of the Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Plaintiff's Due Process claim only merits consideration of Ms. Jessie's actions deprived him of "liberty" or "property," Roth, 408 U.S. at 571; Shelton v. City of Atlanta, 796 F.2d 1391, 1392 (11th Cir. 1986); Moore v. Otero, 557 F.2d 435, 437 (5th Cir. 1977). Plaintiff fails to make that showing here. A property interest must rest upon "a legitimate claim of entitlement." Roth, 408 U.S. at 577; Bank of Jackson County, 980 F.2d at 1366. "As a matter of federal law a property interest is created whenever a

public employee can only be fired 'for cause.'" Brown v. Georgia De't of Revenue, 881 F.2d 1018, 1025 (11th Cir. 1989) (citing Perry v. Sindermann, 408 U.S. 593, 602 n. 7, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)); see also Harris v. Fulton-Dekalb Hosp. Authority, 255 F. Supp. 23 1347, 1373-74 (N.D. Ga. 2002). State law determines whether a particular employee is terminable at will or only for cause. Brown, 881 F.2d at 1025; see also Bishop v. Wood, 426 U.S. 341, 344-45, 96 S. Ct. 2074, 48 L. Ed. 23 684 (1976). An explicit contractual provision, rules, or common understanding may be determinative. Brown, 881 F.2d at 1025.

In this case Section 2 of Rule 9 of the City of Riverdale Personnel Rules vests the police chief in the consultation with the city manager, with authority of appoint officers to the ranks of captain, major, and the chief. Section 2 of Rule 9 also provides that individuals appointed to the rank of captain, major, or chief "serve at the will and pleasure of the Chief of Police... [and]... has no vested right to the position nor does he/she have a right of grievance or appeal if re-assigned to his/her former position or rank within the Department." (See Deposition of Sandra Meyers, February 24, 2006 [hereinafter "Meyers Dep."] at 8, Exh. 1, City of Riverdale Personnel Rules). Indeed, it is undisputed that the police chief can reclassify or remove the higher rank at any time and for any reason, and that this type of reclassification is not subject to the City's grievance process, because employees do not have a vested right in these appointed positions. (DSMF ¶¶

3, 4). These provisions and undisputed facts clearly establish that individuals holding the rank of captain or higher may be removed or reclassified at will. The record also includes evidence that other captains were reassigned to sergeant positions, and Plaintiff does not identify any state law creating a property interest in the captain position. See Moore, 557 F.2d at 437 (finding police officer demoted from corporal position h ad no property interest where the city's code clearly stated that corporals served at the pleasure of the police chief and mayor, the police chief has reassigned corporals to regular policeman duties on other occasions, and the plaintiff did not identify any state law creating a property interest in the corporal position). Thus, Plaintiff has failed to show that he had any property interest in a captain position or other higher rank. Plaintiff also does not show that he was deprived of any liberty interest under the terms of the Due Process clause. Thus, the Court finds that Plaintiff's Due Process claims against Ms. Jessie failed, and it **RECOMMENDS** that summary judgment be **GRANTED** to defendant Jessie on the Equal Protection and Due Process claims asserted against her. Docket Entry [46].

F. Plaintiff's Fourteenth Amendment Due Process and Equal Protection Claims Against Defendants martin and Wallace

Plaintiff alleges that Mr. Martin and Ms. Wallace violated the Fourteenth Amendment Due Process and Equal Protection clauses when Mr. Martin issued his July 2, 2004 decision suspending Plaintiff

for three days and when Ms. Wallace hired Chief Knox as police chief and told Plaintiff, "I will get you." Mr. Martin and Ms. Wallace contend that Plaintiff's claims against them fail as a matter of law, because Plaintiff released all these claims when he signed the November 2, 2004 Release, and because Plaintiff does not show that these actions are constitutional violations. (Defs.' Reply at 11-12). The Court agrees with Defendants. As discussed above, the November 2, 2004 Release applies to these claims. The Court also finds that Plaintiff has not demonstrated any constitutional violation. Thus, the Court **RECOMMENDS** that summary judgment be **GRANTED** to Defendants Martin and Knox on Plaintiff's Due Process and Equal Protection claims against them. Docket Entry [46].

G. Plaintiff's Fourteenth Amendment Equal Protection Claim Against Defendant Knox

Plaintiff alleges that Chief Knox violated the Fourteenth Amendment Equal Protection clause when she demoted Plaintiff to sergeant and replaced him with a less qualified white female, while not demoting a less qualified white male captain, Plaintiff also alleges that Chief Knox violated the Equal Protection clause when she later promoted two less qualified officers to captain over Plaintiff. (Pl. Resp. At 40). Defendant Knox argues that Plaintiff's Title VII claims fail. (Defs. Reply at 13-14). The Court agrees. See Snider, 344 F.3d at 1328n. 4. Accordingly, the Court **RECOMMENDS** that summary judgment be granted to Defendant Knox

on Plaintiff's Equal Protection Clause claims against her. Docket Entry [46].

H. Qualified Immunity

Defendants contend that qualified immunity protects them against Plaintiff's claims, because each acted within the scope of their discretionary capacity, and because Plaintiff cannot show a clear violation of his First or Fourteenth Amendment rights. Defendants argue that Plaintiff does not show that any of them violated a clearly established right, because Plaintiff's speech was not a matter of public concern, no due process violations occurred, and Plaintiff only makes a broad assertion that federal law prohibits employment discrimination and retaliation on the basis of race, sex, and speech. (Indiv. Defs.' MSJ at 2-4; Defs.' Reply at 10). Plaintiff argues that qualified immunity does not protect the individual Defendants, because federal laws prohibiting employment retaliation and discrimination on the basis of race, sex, and speech have long been established by the Supreme Court and the Eleventh Circuit (Pl. Resp. At 41). The Court finds that qualified immunity protects the individual Defendants.

"Qualified immunity offers complete protection for government officials sued in their individual capacities of their [discretionary] conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' "[8] Vinyard v. Wilson, 311 F.3d 1340, 1346

(11th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); see also Alexander, 207 F.3d at 1320. On a motion for summary judgment based on defense of qualified immunity, the court must determine "whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." Yeldell v. Cooper Green Hospital, Inc., 956 F.2d 1056, 1064 (11th Cir. 1992). The defendant must first prove that he was acting within the scope of his discretionary authority at the time the allegedly wrongful acts occurred. Vinyard, 311 F.3d at 1346. If the defendant meets this burden, the burden shifts to the plaintiff to establish that the defendant's conduct violated clearly established law Williams v. Bd. Of Regents of Univ. Sys. Of Georgia, 441 F.3d 1287, 1302 (11th Cir. 2006); see also Adkins Fulton County, Georgia, 420 F.3d 1293, 1300 (11th Cir. 2005); Hope v. Pelzer, 536 U.S. 730, 736 (2002) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).

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[8]Qualified immunity only serves as a defense to claims for monetary relief. D'Aquanno v. Gallagher, 50 F.3d 877, 879 (11th Cir. 1995).

Plaintiff does not dispute that defendants acted within the scope of their discretionary authority; thus, the Court turns to the dispositive inquiry.

Whether applicable law was clearly established at the time of the challenged actions determined by

reference to decisions of the United States Supreme Court, the Eleventh Circuit Court Appeals, and the Supreme Court of Georgia. D:Aguanno v. Gallagher, 50f.3d 877, 881 n. 6 (11th Cir. 1995); Cournson v. McMillian 9393 F.2d 1479, 1498 & n. 32 (11th Cir. 1991). This inquiry is "fact specific." Rodgers v. Horsley, 39 F.3d 308, 311 (11th Cir. 1994). The plaintiff must point to a controlling case, decided before the events at issue, that establishes a constitutional violation on "Materially similar" facts. The contours of the right must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right. In other words, "[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." Rodgers, 39 F.3d at 311; Post v. City of Fort Lauderdale, 7f.3d 1552, 1557 (11th Cir. 1993), modified, 14 F.3d 583 (11th Cir. 1994)). The plaintiff cannot rely on "general conclusory allegations" or "broad legal truisms." City of Fort Lauderdale, 7 F.3d at 1557; Barts v. Joyner, 865 F.2d 1187, 1190 (11th Cir.), cert. Denied, 493 U.S., 831, 110 S., Ct. 101, 107L. Ed. 2d 65 (1989); Muhammad v. Wainwright, 839 f.2d 1422, 1424 (11th Cir. 1987).

In this case, however, Plaintiff only relies on general conclusory allegations and broad legal truisms that the individual Defendants' conduct violated Title VII. (See Pl. Resp. At 41). Plaintiff does not point to any factually analogous cases that would give notice that the Defendants' actions clearly violated Plaintiff's rights. Accordingly,

Plaintiff has failed to carry his burden. The Court finds that Defendant Martin, Wallace, Knox, and Jessie are entitled to the protection of qualified immunity and, therefore, **RECOMMENDS** that summary judgment be granted in their favor on the claims asserted against them in their individual capacities. Docket Entry [46].

DEFENDANTS' MOTION FOR RULE 11 SANCTIONS

Defendants move this Court to issue sanctions against Plaintiff and Plaintiff's counsel, pursuant to Rule 11 of the Federal rules of Civil Procedure. Docket Entry [65]. Defendants argue that Plaintiff's pursuit of claims against them warrants sanctions, because Plaintiff signed a Release waiving many of the claims asserted against Defendants several months before filing the instant action, the law expressly provides that these individual Defendants cannot be held liable for violations of Title VII, the evidence shows that these Defendants did not participate in the employment decisions that are the basis of Plaintiff's complaint, and Plaintiff has admitted that he has no evidence of due process or free speech violations by these Defendants. ((Defendants' Motion for Rule 11 Sanctions and Brief in Support [hereinafter"Defs.' Mot. Sanctions"] at 1-2). Plaintiff purported to address Defendants' motion for sanctions in his Response in Opposition brief, but he does not specifically address sanctions anywhere in his brief. (See Pl. Resp. At 1, 41). However, Plaintiff does state in his brief that he

intended the Release to be subject to the City's cessation of discriminatory and retaliatory actions against him and that the Release does not bar prosecution of claims include therein, because the City has breached the settlement agreement. Ipl. Resp. At 20).

In Defendants' Reply, Defendants contend that the General Release signed by Plaintiff is not null and void under Georgia law. (Defendants' Reply Brief in Support of Their Motion for rule 11 Sanctions [hereinafter "defs. 'Reply Sanctions"] at 1-2). Defendants further contend that regardless of the validity of the Release, Plaintiff admitted under oath that by executing the Release, he agreed to acquit and forever discharge all legal and equitable claims of every kind and nature, Plaintiff has no evidence that Ms. Jessie or Ms. Wallace participated in any adverse employment action against him or committed any specific violation, and Ms. Jessie is not Plaintiff's employer. (Defs. 'Reply Sanctions at 3-4).

Rule 11 of the Federal rules of Civil Procedure provides that when an attorney signs a written pleading, the attorney is certifying that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under circumstances, the claims contained in the pleadings are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for an improper purpose. See FED. R. Civ. P. 11 9b); Didie

v. Howie, 988 F.2d 1097, 1104 (11th Cir. 1993). "A party may be sanctioned under Rule 11 for filing a pleading that: (1) has no reasonable legal basis; (2) has no reasonable factual basis; or, (3) is filed for an improper purpose." Thomas v. Evans, 880 F.2d 1235, 1239 (11th Cir. 1989) (citing United States v. Milam, 855 F2d 739, 742 (11th Cir. 1988)); see also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990); see FED. R. Civ. P. 11. The Court must consider whether the party's action was reasonable under the circumstances at the time the pleading was filed. See Thread Properties, Ltd. V. Title Ins. Co. Of Minnesota, 875 F.2d 831, 835 (11th Cir. 1989); Didie, 988 F.2d at 1104. "Circumstances to be taken into account include how much time for investigation was available to the signor, whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." Threaf, 875 F.2d at 835. Ultimately, however, the decision as to whether to impose sanctions is within the discretion of the district court. Baker, 158 F.3d at 525; Didie, 988 F.2d at 1103; see also Committee Notes to 1993 Amendments to Fed. R. Civ. P. 11.

Applying the law to the facts of this case, the Court finds that sanctions are warranted. Plaintiff included claims without any reasonable factual or legal basis after having time for investigation and research. In particular, the Court notes that Plaintiff's response in opposition to the tow summary

judgment motions included claims that had previously been dismissed from this case in the Court's November 14, 2005 order and claims that had been waived by Plaintiff. IN including the dismissed claims, Plaintiff willfully disregarded a known court order. Similarly, Plaintiff included claims that had been released without providing any reasonable legal or factual basis for including such claims. Thus, the Court **RECOMMENDS** that Defendants' Motion for Sanctions be **GRANTED**.[9] Docket Entry [65].

CONCLUSION

Based on the foregoing, the Court **DENIES** Defendants' Motion to Strike Plaintiff's Affidavit and **GRANTS** Defendants' Motion to Strike Plaintiff's Response to Reply. Docket Entries [68, 103]. Furthermore, **IT IS RECOMMENDED** that Defendants Jessie, Knox, Martin and Wallace's Motion for Summary Judgement,

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[9]Should the recommendation that sanctions be granted be adopted, a hearing will have to be held before sanctions are imposed.

Defendant City's Motion for Summary Judgment, and Defendants' Motion for Rule 11 Sanctions be **GRANTED**. Docket Entries [46, 47, 65].

SO ORDERED AND REPORTED AND RECOMMENDED, this 13th day of February, 2007.

s/Linda T. Walker
LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE

(2)

No. 07-1575

Supreme Court, U.S.
FILED
JUL 18 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PHILLIP R. NEELY,

Petitioner,

v.

CITY OF RIVERDALE, IRIS JESSIE, THETUS A. KNOX, T. MICHAEL MARTIN and WANDA WALLACE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTIONS PRESENTED

I. Whether the pretext standard as set forth by the United States Court of Appeals for the Eleventh Circuit in *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1994), is consistent with the pretext standard established by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)?

II. Whether a pretext analysis focusing on an employer's beliefs and perceptions regarding an employee's performance is consistent with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)?

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OPINIONS BELOW

The decision of the United States District Court for the Northern District of Georgia granting summary judgment is unreported. (Petitioner's Appendix ("Pet. App.") D). The decision of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's grant of summary judgment is unreported. (Pet. App. B).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment on October 17, 2007. (Pet. App. B). The Eleventh Circuit then entered an order denying petitioner's motion for rehearing on January 14, 2008. (Pet. App. A). Petitioner initially attempted to file his petition for writ of certiorari on or about April 14, 2008.[1] The Clerk of this Court rejected the petition by letter dated April

[1] The Clerk of this Court rejected petitioner's initial petition for a writ of certiorari because the petition did not comply with this Court's Rules. Petitioner now has re-filed his petition, but he has not complied with SUP. CT. R. 12(b)(3) in that he has failed to notify respondents of the date of filing, the date the case was placed on the docket, and the docket number of the case. In fact, when plaintiff served respondents with a copy of his petition, he attached an undated letter notifying respondents that the petition had been successfully filed with the Clerk of this Court. Of significance, the letter did not indicate the date of filing, the date the case was placed on the docket, or the docket number.

18, 2008. Petitioner filed a petition for writ of certiorari (amended) on or about June 16, 2008. Accordingly, the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. 42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

2. 42 U.S.C. § 2000e-3(a)

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Phillip R. Neely ("Petitioner"), an African-American male, was hired by the City of Riverdale ("the City") as a police officer in 1998. (Pet. App. E at E9). In 2002, then-police chief Mike Edwards, promoted petitioner to the rank of police captain.[2] (*Id.*).

On or about July 2, 2004, defendant T. Michael Martin issued a three-day suspension to petitioner for violation of police department rules. (*Id.* at E11). On September 27, 2004, the city hired defendant Thetus Knox, an African-American woman, as the new police chief. (*Id.* at E11). At that time, petitioner held the rank of captain. (*Id.* at E11).

In November 2004, the City posted a vacancy for the position of assistant police chief. (*Id.* at E12). Plaintiff applied for the position but was rejected by Chief Knox because his personnel record indicated that petitioner previously had been suspended for three days in July 2004. (*Id.* at E12). In addition, Chief Knox testified that Major Raymond Spivey informed her that petitioner had been suspended for three days during the preceding twelve months and that she did not independently verify this information. (*Id.* at E31). Upon learning that he was ineligible for a promotion, **petitioner withdrew himself**

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[2] The City police chief has complete authority to promote an individual to the rank of captain or above, and the chief can reclassify (or remove) the higher rank at any time and for any reason. (*Id.* at E10).

from consideration and did not otherwise challenge Chief Knox's conclusion that he was ineligible for a promotion to assistant police chief. (*Id.* at E12-13).

The City assembled an independent panel of police chiefs to conduct interviews and select the new assistant police chief. (*Id.* at E13). The panel unanimously ranked Samuel Patterson, an African-American male, as the top-ranked candidate, and Chief Knox accepted the panel's recommendation to hire Patterson as assistant police chief. (*Id.* at E13).

In the meantime, Chief Knox adopted a department-wide plan to restructure and reorganize departments, tasks, and supervisors. (*Id.* at E16). Additionally, Chief Knox's restructuring plan included promotions and demotions. (*Id.* at E17). On March 2, 2005, both petitioner and Bobby Jones, a Caucasian male, were demoted from the rank of captain to the rank of sergeant. (*Id.* at E17). Petitioner's pay was not reduced as a result of the reclassification. Chief Knox selected petitioner for demotion because she believed that the rank of sergeant was commensurate with petitioner's demonstrated performance. (*Id.* at E41). She did not believe petitioner to be supportive of her leadership, he undermined her authority, challenged her decisions, and, therefore, she used her complete discretionary authority to reclassify him to sergeant. (*Id.* at E10, E41).

Thereafter, petitioner, through counsel, filed the instant lawsuit against the City, Iris Jessie, Thetus

Knox, T. Michael Martin, and Wanda Wallace (collectively "the respondents"). (*Id.* at E5). Petitioner alleged discrimination based on race and gender and retaliation for having filed charges with the Equal Employment Opportunity Commission ("EEOC"), in violation of 42 U.S.C. § 1983, 42 U.S.C. § 1988, 42 U.S.C. § 1991, and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). (*Id.* at E5). Additionally, petitioner maintained that his rights under the First and Fourteenth Amendments to the United States Constitution had been violated. (*Id.* at E5).

On April 10, 2006, respondents Iris Jessie, Thetus Knox, T. Michael Martin, and Wanda Wallace filed a motion for summary judgment. (*Id.* at E1). On the same day, the City filed a separate motion for summary judgment. (*Id.* at E1-2). On June 1, 2006, Jessie, Martin and Wallace filed a motion for sanctions based on the frivolous nature of his claims pursuant to Fed. R. Civ. P. 11. (*Id.* at E2).

On February 13, 2007, a Magistrate Judge issued a 64-page Report and Recommendation ("R & R") recommending that the district court grant the respondents' motions for summary judgment and sanctions. (See Pet. App. E). The Magistrate Judge concluded that petitioner failed to prove respondents' legitimate non-discriminatory reason for hiring Patterson to assistant police chief amounted to pretext. (*Id.* at E30-32). Citing *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001), the Magistrate Judge determined, *inter alia*, that regardless of

whether the City actually suspended petitioner pursuant to the July 2, 2004 order, petitioner failed to show that Chief Knox did not believe that petitioner had been suspended and was therefore ineligible for promotion. (*Id.* at E31). The Magistrate Judge further found that petitioner could not show that respondents' legitimate nondiscriminatory reasons for not promoting petitioner to captain and demoting petitioner to the rank of sergeant were pretextual. (*Id.* at E33-43).

On March 29, 2007, the district court overruled petitioner's objections, adopted the magistrate's R & R, and granted summary judgment in favour of the respondents. (See Pet. App. C & D). The district court concluded, *inter alia*, that the evidence did not create a question of fact as to whether Chief Knox actually believed that petitioner was ineligible for promotion to assistant police chief because of a previous suspension. (Pet. App. D at D6-8). Additionally, the district court rejected petitioner's failure to promote to captain claim because petitioner failed to rebut evidence showing those promoted expressed a willingness to work with Chief Knox but petitioner did not. (*Id.* at D8-10). Similarly, regarding petitioner's claim of discriminatory and retaliatory demotion, the district court concluded that petitioner failed to create an issue of fact with regard to pretext because his evidence merely questioned the wisdom of the decision but did not show that the decision was based on discrimination or retaliation. (*Id.* at D10-11). Finally, the district court rejected petitioner's remaining claims

and imposed sanctions pursuant to Fed.R.Civ.P. 11. (*Id.* at D62-63).

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. On October 17, 2007, the Eleventh Circuit affirmed without discussion the district court's order granting summary judgment in favor of respondents. (Pet. App. B). Petitioner then filed a petition for rehearing and rehearing en banc, which the 11th Circuit summarily denied on or about January 14, 2008. (Pet. App. A).

ARGUMENT

Title VII prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII also makes it "an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . " 42 U.S.C. § 2000e-3(a). Absent direct evidence of intentional discrimination, a plaintiff may show intentional discrimination through circumstantial evidence by utilizing the analytical framework established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). Under the *McDonnell Douglas* framework, a plaintiff must first

establish, by a preponderance of the evidence, a "*prima facie*" case of racial discrimination. *Id.* at 802, 93 S.Ct. at 1824. Under *McDonnell Douglas*, "[e]stablishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094 (1981).

If the plaintiff satisfies this initial burden, the burden shifts to the defendant to proffer a legitimate, non-discriminatory reason for the adverse employment action. *Id.*, 101 S.Ct. at 1094. If the defendant produces sufficient evidence to support a non-discriminatory explanation for its decision, the inference of discrimination is rebutted and the plaintiff must be afforded the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination or retaliation. *Id.* at 256, 101 S.Ct. at 1095.

A plaintiff may succeed in demonstrating pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.*, 101 S.Ct. at 1095. Notably, the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual." *Id.* at 255 n.10, 101 S.Ct. at 1095 n.10.

As this Court has made clear, the ultimate question is whether the employer intentionally discriminated, and the fact that "the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason . . . is correct." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524, 113 S.Ct. 2742, 2756 (1993). Stated differently, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Id.* at 519, 113 S.Ct. at 2754 (alterations omitted).

This Court has recognized that there may be occasions when the factfinder can infer the ultimate fact of discrimination from the falsity of the employer's explanation. *See id.* at 511, 113 S.Ct. at 2749. In *St. Mary's*, this Court held that:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, . . . [and] upon such rejection, no additional proof of discrimination is required.

Id. at 511, 113 S.Ct. at 2749. This Court reaffirmed this proposition in *Reeves*, holding that "a plaintiff's *prima facie* case, combined with sufficient evidence to

find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 2109 (2000). This Court cautioned, however, that such a showing by a plaintiff will not always be adequate to support a finding of unlawful discrimination, such as when the record reveals some other non-discriminatory reason for the decision. *Id.*, 120 S.Ct. at 2109.

As an initial matter, petitioner maintains that this Court has not yet determined whether a plaintiff's *prima facie* case of retaliation, combined with sufficient evidence to find that the employer's asserted justification was false, may permit a fact-finder to conclude that the employer unlawfully retaliated against the plaintiff based on his participation in protected activity under Title VII. (Pet. at 8-9). It is true that *Reeves* and *St. Mary's* both involved claims of employment discrimination, as opposed to retaliation. Nevertheless, respondents submit that this Court already has recognized implicitly the applicability of *Reeves* and *St. Mary's* to a claim of unlawful retaliation under Title VII. *See Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71, 126 S.Ct. 2405, 2417 (2006).

I. The pretext standard as set forth by the United States Court of Appeals for the Eleventh Circuit in *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1994), is consistent with the pretext standard established by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000).

Petitioner contends that the pretext standard established by the Eleventh Circuit in *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1994), is inconsistent with the pretext standard as set forth by this Court in *Reeves*.[3] Respondents submit that petitioner's contention is completely without merit as he is merely attempting to fashion a mythical inconsistency out of thin air.

In *Hairston*, a case involving the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.*, the Eleventh Circuit, citing *McDonnell Douglas*, held that a plaintiff may succeed at the pretext stage "by directly persuading the court at

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[3] Although not entirely clear, it appears that petitioner contends that the pretext standards applied by both the Eighth Circuit in *McCullough v. Real Foods, Inc.*, 140 F.3d 1123 (8th Cir. 1998) and the Eleventh Circuit in *Hairston* are inconsistent with the pretext standard in *Reeves*. Since *Hairston* is entirely consistent with this Court's ruling in *Reeves*, these respondents take the position that there is no circuit split regarding this issue. To that end, this brief does not address whether *McCullough* applies the proper pretext standard as the Eighth Circuit's standard is irrelevant to the current case.

trial that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 9 F.3d at 920. The Eleventh Circuit further held that, in order to establish pretext, a plaintiff is not required to introduce evidence beyond that already offered to establish the *prima facie* case, although the evidence submitted in support of the *prima facie* case may be considered. *Id.*

Like *Reeves*, the Eleventh Circuit's holding in *Hairston* recognizes that disbelief of the employer's proffered reason, coupled with evidence already introduced to establish the *prima facie* case, may be enough for a plaintiff to show pretext. Indeed, petitioner himself acknowledges that the Court in *Hairston* held that a "plaintiff [is] not required to introduce evidence beyond that already offered to establish a *prima facie* case to show pretext." (Pet. at 10). Respondents therefore submit that, notwithstanding petitioner's contentions to the contrary, no incongruity exists between the Eleventh Circuit's decision in *Hairston* and this Court's holding in *Reeves*.

In the instant case, both the district court and the Eleventh Circuit applied the proper pretext standard, and petitioner's suggestion that there was a legal error below is simply without merit. The defendants presented legitimate, nondiscriminatory reasons for its employment actions. Specifically, the defendants demonstrated, *inter alia*, that (1): Chief Knox believed that petitioner had been suspended,

thus making petitioner ineligible for a promotion to assistant police chief; (2) petitioner was demoted to the rank of sergeant as part of Chief Knox's restructuring plan because he was not supportive of her authority and leadership and did not possess the qualifications she required; (3) at the time that petitioner was demoted to sergeant, another African-American male was promoted; and (4) petitioner was not a team player, thereby precluding a promotion to the rank of captain. (*See* Pet. App. E). The district court, applying the proper legal standard, found that petitioner failed to demonstrate that the defendants' proffered reasons were unworthy of credence, and the record evidence supports the district court's conclusion. (*Id.*).

In contrast, as the district court held, petitioner merely questioned the wisdom of the respondents' decisions but failed to show that the decisions were based on discrimination or retaliation. Nevertheless, petitioner maintains that he was not suspended and that he was more qualified for the positions of captain and assistant police chief than those who actually were selected. As *Reeves* makes clear, however, an employer may make an employment decision for any reason at all, even a decision based on erroneous facts, so long as the employment decision is not motivated by the intent to discriminate based on a protected ground. 530 U.S. at 141. Having produced evidence demonstrating legitimate, nondiscriminatory reasons for its employment decisions, the burden fell on petitioner to demonstrate that the respondents'

proffered reasons were false or unworthy of credence. Petitioner failed to satisfy this burden, and he presented no other evidence that would support the conclusion that the respondents' actions were motivated by racial animus particularly in light of the fact that the ultimate decision-maker, Thetus Knox, is African-American. Accordingly, the district court properly granted summary judgment in favour of respondents and the Eleventh Circuit properly affirmed.

II. The District Court's evaluation of the employer's beliefs and perceptions regarding an employee's performance is consistent with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000).

Citing *Cofield v. Goldkist, Inc.*, 267 F.3d 1264 (11th Cir. 2001), petitioner argues that the Eleventh Circuit's pretext analysis, by focusing on the employer's beliefs and perceptions regarding the employee's performance, places a higher burden of proof on a plaintiff than is required by *Reeves*. (Pet. at 13-14). According to petitioner, rather than focusing on the employer's beliefs and perceptions regarding the employee's performance, the court should have instead focused on whether the evidence shows that the employer's proffered reason was false. (*Id.* at 14).

In *Cofield*, a female employee was denied a promotion and brought an action against her employer alleging race and sex discrimination under the

ADEA and Title VII. 267 F.3d 1264. After the employer asserted a legitimate, nondiscriminatory reason for not promoting Cofield, she maintained that the employer's proffered reason was pretextual because she was more qualified for the position than Bowen, the younger male employee who actually received the promotion. *Id.* at 1268. The Eleventh Circuit held that Cofield could not establish pretext simply by showing that she was more qualified than Bowen. *Id.* Rather, the Eleventh Circuit instructed that the pretext inquiry centers upon the employer's beliefs and not the employee's own perceptions of her performance. *Id.* Accordingly, the Court held that "[t]he relevant inquiry for us, then, is not to judge which employee was more qualified, but to determine whether any disparity between Bowen's and Cofield's managerial qualifications is so great that a reasonable fact-finder could infer that [the employer] did not believe Bowen to be better qualified." *Id.*

Respondents submit that any purported inconsistency between the Eleventh Circuit's decision in *Cofield* and this Court's holding in *Reeves* is illusory. As noted above, a plaintiff may succeed in demonstrating pretext by showing that the employer's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1095. The Eleventh Circuit, by focusing on the employer's beliefs and perceptions regarding the employee's performance, is entirely consistent with this standard.

Indeed, an inquiry into the employer's beliefs regarding the subject employee is essential in

evaluating whether the employer's proffered reasons were false or unworthy of credence. As such, plaintiff's contention that the Eleventh Circuit's inquiry into the employer's beliefs and perceptions places a higher burden of proof on a plaintiff than is required by *Reeves* is without merit. Moreover, by focusing on the employer's perceptions and belief's regarding the employee's performance, the Eleventh Circuit's pretext analysis is designed to answer the ultimate question in issue – that is, whether the plaintiff has proven that the employer purposefully discriminated or retaliated against the employee based on a protected ground. *St. Mary's*, 509 at 524, 113 S.Ct. at 2756.

Additionally, petitioner asserts that, with respect to his failure to promote to assistant police chief claim, the district court and Eleventh Circuit overlooked the evidence supporting his *prima facie* case and his contention that Chief Knox was not worthy of belief. (Pet. at 15). Petitioner's contentions are without merit, as the Magistrate Judge and district court issued well-reasoned decisions that examined the evidence submitted in great detail.

The district court observed that Chief Knox believed plaintiff had been suspended for three days during the preceding twelve months and petitioner had failed to show otherwise. (Pet. App. E at E9 & E31). To that end, Chief Knox notified petitioner that he was ineligible for promotion. (*Id.* at E12). Incredibly, petitioner removed himself from consideration yet still claimed that he deserved a promotion and was

denied said promotion because of his race. (Id. at E12-13). Moreover, petitioner conveniently ignored the fact that the person ultimately hired as assistant police chief is an African-American. Accordingly, after noting that petitioner failed to show that he attempted to correct Chief Knox's alleged misconception about his suspension, the district court properly rejected petitioner's frivolous claim. (Id. at E31).

Thus, far from ignoring the evidence submitted by petitioner, both the Magistrate Judge and district court analyzed the evidence in great detail and determined that petitioner could not show that respondents' legitimate, nondiscriminatory reasons for not promoting petitioner to assistant police chief were pretextual. The district court properly concluded that the undisputed testimony from Chief Knox showed that she believed petitioner had been suspended and that, as a result, petitioner was ineligible for a promotion.

Petitioner failed to present any evidence showing that Chief Knox was motivated by a discriminatory or retaliatory intent. Again, the central inquiry is whether the plaintiff has proven that the employer purposefully discriminated or retaliated against the employee based on a protected ground. *St. Mary's*, 509 at 524, 113 S.Ct. at 2756. Absent such evidence, the district court and the Eleventh Circuit properly concluded that petitioner failed to show that Chief Knox's reasons for not promoting him were pretextual.

CONCLUSION

Despite petitioner's contentions to the contrary, the pretext standard as set forth by the Eleventh Circuit in *Hairston* is entirely consistent with the pretext standard utilized by this Court in *Reeves*. Specifically, *Hairston*, like *Reeves*, recognizes that disbelief of an employer's proffered reason, coupled with evidence already introduced to establish a *prima facie* case of discrimination, may be enough for a plaintiff to establish pretext. In addition, an evaluation of an employer's beliefs and perceptions regarding an employee's performance is a proper basis for a pretext analysis under *Reeves* as such an inquiry is designed specifically to answer the ultimate question in issue – that is, whether the plaintiff has proven that the employer purposefully discriminated or retaliated against the employee based on a protected ground. Accordingly, based on the foregoing, respondents respectfully pray that this Court denies petitioner's petition for a writ of certiorari.

Respectfully submitted,

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